Supreme Court, U.S.
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90-1562

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

S.J. GROVES & SONS COMPANY AND
JASPER CONSTRUCTION COMPANY,
Petitioners,
v.
FULTON COUNTY, GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Congress authorized the Department of Transportation ("DOT") to create regulations requiring state and local governments receiving federal funding to award fixed percentages of contract work on the basis of race or ethnic origin?

2. Whether strict scrutiny should be employed to determine whether regulations promulgated by DOT, which require state and local governments receiving federal funding to classify on the basis of race or ethnic origin, violate the equal protection component of the Fifth Amendment?

3. Whether Fulton County's 20% race-conscious set-aside program is subject to strict scrutiny?

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest in the outcome of this litigation.

Petitioners: S. J. Groves & Sons Company

Jasper Construction Company (Jasper Construction Company is a wholly owned subsidiary of S.J. Groves & Sons Company)

Respondent: Fulton County, Georgia

The United States Department of Transportation was a party in the district court and an appellant in the court of appeals. On September 18, 1989, the Eleventh Circuit dismissed the United States Department of Transportation pursuant to its motion for voluntary dismissal.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 920 F.2d 752 (11th Cir. 1991) and is reproduced in the Appendix to this petition at App 1a. The district court opinion is reported at 696 F. Supp. 1480 (N.D. Ga. 1987) and is reproduced in the Appendix to this petition at App. 1b. The district court's other orders are unpublished but are reproduced in the Appendix at App. 1c, 1d, and 1e.

JURISDICTION

The opinion and the judgment of the court of appeals were entered on January 7, 1991. This petition has been timely filed in accordance with Rule 13 of the Rules of this Court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U. S. Const., Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const., Amend. XIV, Sec. 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. Const., Amend. XIV, Sec. 5:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 2000(d) (Title VI):

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 30 of the Airport and Airway Development Act of 1970, 49 U.S.C. § 2219:

> The Secretary shall take affirmative action to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this chapter. The Secretary shall promulgate such rules as the Secretary deems necessary to carry out the purposes of this section and may enforce this section, and any rules promulgated under this section, through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964. The provisions of this section shall be considered to be in addition to and not in lieu of the provisions of title VI of the Civil Rights Act of 1964.

Part 23 - Participation by Minority Business Enterprise in Department of Transportation Programs, 49 C.F.R. §§ 23.01-23.55:

> The relevant DOT Regulations are reprinted in the Appendix at App. 1f.

O.C.G.A. § 36-10-2:

> Whenever it becomes necessary to build or repair any courthouse, jail, bridge, causeway, or other public works in any county, the county governing authority shall cause the same to be built or repaired by letting out the contract therefor to the lowest bidder, at public outcry, before the courthouse door, after having advertised the letting of the contracts, as provided in Code Section 36-10-3, provided that such county authorities shall have authority to reject any and all bids at the public letting. If, in their discretion, the public interest and economy require it, the county authorities may build or repair any public buildings, bridges, causeways, or other public property in the county by contract or sealed proposals, to be invited under the same provisions as to specifications and like information as are provided in Code Sections 36-10-3 and 36-10-4.

STATEMENT OF THE CASE

This action arose out of a runway resurfacing project at a Fulton County, Georgia, airport (the "airport project"). The County elected to apply to the Federal Aviation Administration ("FAA") for federal grant funds, pursuant to the Airport and Airway Development

Act of 1970, as amended ("AADA"). To comply with a condition of the FAA grant, the County prepared and submitted a minority business enterprise ("MBE") program (the "1982 Program"), pursuant to regulations which had been promulgated by the United States Department of Transportation ("DOT"), 49 C.F.R. § 23.1, *et seq*. Subpart C of the DOT Regulations, 49 C.F.R. § 23.41-§ 23.55 (the "DOT Regulations"), requires recipients of DOT financial assistance, such as the County, to implement an MBE program as a condition to the receipt of federal funds.[1] The DOT Regulations did not establish a

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[1] Subsection(g) requires grant recipients to establish percentage goals for the dollar value of work to be awarded to MBE's, including overall goals and goals on each specific prime contract. 49 C.F.R. § 23.45(g). Subsection(h) requires grant recipients to impose upon bidders the requirement that those bidders who do not meet the MBE contract goals must satisfy the recipient that the bidder has made "good faith efforts" to meet MBE goals. 49 C.F.R. § 23.45(h).

The DOT Regulations define minority as follows:

"Minority" means a person who is a citizen or lawful permanent resident of the United States and who is:

(a) Black (a person having origins in any of the black racial groups of Africa);

(b) Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race);

(c) Portuguese (a person of Portuguese, Brazilian, or other Portuguese culture or origin, regardless of race);

(d) Asian American (a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands); or

percentage goal for minority participation, but required grantees to do so.[2] The County's 1982 Program called for a goal of not less than 20% minority participation in the airport project.[3]

Groves[4] submitted the lowest responsive bid for the airport project, with an MBE participation component of 4.15%. The County, however, awarded the contract to

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(e) American Indian and Alaskan Native (a person having origins in any of the original peoples of North America).

(f) Members of other groups, or other individuals, found to be economically and socially disadvantaged by the Small Business Administration under section 8(a) of the Small Business Act, as amended (15 U.S.C. 637(a)).

49 C.F.R. § 23.5. "Minority business enterprise" or "MBE" is defined as "a small business concern . . . which is owned and controlled by one or more minorities or women." *Id.*

[2] This case does not involve a challenge to Subpart D of the DOT Regulations, which requires federal grant recipients to utilize "disadvantaged businesses" for not less than 10% of the dollar value of highway and urban mass transportation projects. 49 C.F.R. §§ 23.61, 23.63.

[3] The 20% MBE participation goal was the same percentage which the County had earlier required for all County contracts, regardless of the source of funding. *See* the County's Policy Statement contained in its 1982 Program (reproduced in the Appendix at App. 1g).

[4] Jasper and Groves are non-minority owned construction companies. Jasper is a subsidiary of Groves. Groves performed public construction work in the Fulton County, Georgia, area before December 1, 1982, when Groves assigned its rights and delegated its duties in existing contracts to Jasper. "Groves" will be used to refer to both Groves and Jasper collectively.

another bidder because Groves had not satisfied the required MBE percentage goals. Groves sued the County, contending that its rejection of Groves' bid violated Georgia's Low Bid Statute, O.C.G.A. § 36-10-2, and that the 1982 Program violated Title VI of the Civil Rights Act of 1964 and the equal protection clause of the Fourteenth Amendment. Jurisdiction in the district court was based on 28 U.S.C. §§ 1331 and 1332(a).

The district court determined that it could not rule on Groves' claims that the County's rejection of Groves' bid violated the Low Bid Statute and that the 1982 Program was unconstitutional without joining DOT to defend the DOT Regulations. The DOT was then joined as a party. Groves amended its Complaint to allege that the DOT Regulations violated the equal protection component of the Fifth Amendment.

On cross motions, the district court granted summary judgment for Groves, holding that: (1) the civil rights section of the AADA provided the requisite congressional authority to require racial preferences by a recipient of federal funds if such preferences were found necessary to remove or overcome the effects of past discrimination; (2) the DOT Regulations were not justified by a compelling governmental interest because DOT's findings of prior discrimination were inadequate; and (3) the DOT Regulations were not narrowly tailored because they did not provide adequate assurance that their application would be limited to accomplishing remedial objectives. *S.J. Groves & Sons Co. v. Fulton County*, 696 F. Supp. 1480, 1495 (N.D. Ga. 1987). Because the DOT Regulations were constitutionally invalid, they could not preempt Georgia's Low Bid Statute. Thus, the district

court found that Groves, as the low bidder, should have been awarded the contract for the airport project.

Fulton County and DOT brought an interlocutory appeal, which was stayed pending the Supreme Court's action in *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987), *prob. juris. noted*, 484 U.S. 1058 (1988), *aff'd*, 488 U.S. 469 (1989), and *H.K. Porter Co. v. Metropolitan Dade County*, 825 F.2d 324 (11th Cir. 1987), *cert. granted*, 489 U.S. 1062 (1989). Following the Court's decision in *Croson*, the Eleventh Circuit granted DOT's motion to dismiss its appeal in this case. *See Groves*, 920 F.2d at 756 n.8.

The Eleventh Circuit decided that, under Georgia law, Fulton County had no authority to enact its MBE program and that the County could escape liability for violating the Low Bid Statute only if the DOT Regulations preempted Georgia law. *Groves*, 920 F.2d 752 (11th Cir. 1991).[5] The Eleventh Circuit rejected Fulton County's other defenses to the violation of the Low Bid Statute and examined the constitutionality of the DOT Regulations, upon which the County based its preemption defense. The Eleventh Circuit concluded that Section 30 of the AADA authorized the DOT to promulgate its Regulations which require grant recipients to establish set-aside programs. The Eleventh Circuit then attempted to "determine the proper standard by which to evaluate the constitutional validity of the DOT Regulations." *Id.* at 765. Acknowledging that "the resolu-

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[5] Groves does not intend to pursue its challenge to the County's 1984 MBE Resolution, which was rejected on standing grounds. 920 F.2d at 759.

tion of the proper standard to be applied to the DOT Regulations is difficult," the Eleventh Circuit concluded that "the district court, quite understandably, applied the incorrect standard." *Id.*

The Eleventh Circuit noted that in *Croson*, "a majority of the Court seemed to settle on a strict scrutiny standard for all government measures containing racial classifications." *Id.* at 766. "If *Croson* were the Supreme Court's latest word on this question, [the Eleventh Circuit probably would have agreed] that the district court, in applying the strict scrutiny standard to the DOT Regulations, had proceeded correctly." *Id.* However, citing the Court's recent decision in *Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 2997 (1990), the Eleventh Circuit concluded "that the district court erred in subjecting the Regulations to the more stringent strict scrutiny standard." 920 F.2d at 766. "Although the issue is hardly free of doubt, our reading of *Metro Broadcasting* leads us to conclude that the Supreme Court would utilize an intermediate level of scrutiny in evaluating the DOT Regulations." *Id.* The Eleventh Circuit remanded the case for reconsideration of the validity of the DOT Regulations under "intermediate" scrutiny.

REASONS FOR THE ALLOWANCE OF THE WRIT

SUMMARY.

This case presents the Court with important and unsettled issues of federal law. This Court should decide the standard of review to be employed in judging racial classifications mandated by a federal administrative agency. This case also presents the Court with an opportunity to determine the extent, if any, to which the

equal protection analysis of *Metro Broadcasting*, 110 S.Ct. 2997 (1990), will be applied in the context of public contracting. This case will also permit the Court to define the standard of review to be applied to local implementation of a federally-developed affirmative action program where specific percentage goals have not been established by either Congress or a federal agency.

By holding that Congress authorized the DOT to develop a race-conscious affirmative action program, the court of appeals decided the issue of congressional authority contrary to applicable decisions of this Court. Because the AADA does not contemplate the race-conscious DOT Regulations, they do not have the force and effect of law. Even if the DOT Regulations were authorized, Congress did not mandate a national race-conscious affirmative action program. Because no congressional mandate is involved, and it was an administrative agency (DOT) that required the County to implement its 1982 MBE Program, the court of appeals should have followed this Court's decisions in *Fullilove*, 448 U.S. 448 (1980), and *Croson*, 488 U.S. 469 (1989), and affirmed the district court's analysis of the DOT Regulations under strict scrutiny.

DISCUSSION.

1. *Because Congress Did Not Authorize The DOT Regulations, They Do Not Have The Force And Effect Of Law.*

Before addressing the constitutionality of the DOT Regulations, the Eleventh Circuit had to address the question of DOT's authority to create its MBE program. Although the answer was "not clear," the Eleventh

Circuit concluded that Congress authorized the DOT Regulations. 920 F.2d at 764.

Groves submits that the DOT Regulations exceeded the legislative authority pursuant to which they were promulgated. The DOT's exercise of quasi-legislative authority was not "rooted in a grant of such power by the Congress." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). Because the DOT Regulations lack congressional authorization, they lack the force and effect of law.

DOT identifies eight sources of authority for the DOT Regulations.[6] A cursory review of these sources reveals that only one source could even arguably authorize the DOT Regulations. *See Groves*, 920 F.2d at 764; *Groves*, 696 F. Supp. at 1483-84; *Central Alabama Paving, Inc. v. James*, 499 F. Supp. 629, 637-38 (M.D. Ala. 1980) (legislation "fall[s] far short of authorizing DOT to promulgate the MBE regulations which are here challenged").[7]

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[6] Sec. 905 of the Railroad Revitalization and Regulatory Reform Act of 1978 (45 U.S.C. 803); Sec. 30 of the Airport and Airway Development Act of 1970, as amended (49 U.S.C. 1730); Sec. 19 of the Urban Mass Transportation Act of 1964, as amended (Pub. L. 95-599); Title 23 of the U.S. Code (relating to highways and highway safety); Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*); The Federal Property and Administrative Services Act of 1949 (49 U.S.C. 471 *et seq.*); Executive Order 11625; Executive Order 12138.

Preface to 49 C.F.R. Part 23.

[7] In *M.C. West, Inc. v. Lewis*, 522 F. Supp. 338, 345 (M.D. Tenn. 1981), the court rejected all but Executive Order 11625 as authority for the DOT Regulations. *Id.* at 346. The district court in *Groves* found

The only possible source of authority for the DOT Regulations is Section 30 of the AADA.[8] The district court and the Eleventh Circuit erred in concluding that Section 30 of the AADA provided DOT with the requisite authority to promulgate the DOT Regulations.[9]

Section 30 of the AADA does not authorize the DOT Regulations because it is facially race-neutral. The words "affirmative action" are used in their generic sense and merely permit the DOT to take positive steps — to do things — to effectuate the purpose of Section 30 of the AADA and to prevent discrimination. There is a clear distinction between the generic use of the words "affirmative action," and the use of "affirmative action program" as a term of art.[10] Had the AADA authorized or

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unpersuasive the *West* court's reliance on the Executive Order. *See Groves*, 696 F. Supp. at 1483 n.5.

8 The Secretary shall take affirmative action to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this chapter. The Secretary shall promulgate such rules as the Secretary deems necessary to carry out the purposes of this section and may enforce this section and any rules promulgated under this section, through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964.

49 U.S.C. § 2219.

9 *See Groves*, 920 F.2d at 764-65; *Groves*, 696 F. Supp. at 1483-85.

10 *Compare* 15 U.S.C. § 2622(b)(2) ("the Secretary shall order . . . the person who committed such violation to take affirmative action to abate the violation"); 12 U.S.C. § 1786(f)(1) ("the Board may issue a temporary order requiring the credit union . . . to cease and desist from

contemplated the DOT Regulations, it would have, at a minimum, plainly called for a race-conscious affirmative action *program*.

The Eleventh Circuit also erred by holding that the AADA endorses race-conscious rules by reference. 920 F.2d at 764-65. The relevant sentence provides:

> *The Secretary* shall promulgate such rules as the Secretary deems necessary to carry out the purposes of this section and *may enforce this section* and any rules promulgated under this section, *through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964.*

49 U.S.C. § 2219 (emphasis added). Both lower courts stated that this language referred to a rule promulgated under Title VI which "does not prohibit" race-conscious affirmative action programs. *See* 49 C.F.R. § 21.5(b)(7) ("Subsection 7").[11]

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any violation or practice and to take affirmative action to prevent such insolvency, dissipation, condition, or prejudice pending completion of such proceedings") *with* 29 U.S.C. § 791(b) ("each department . . . shall . . . submit . . . an affirmative action program plan for the hiring, placement and advancement of individuals with handicaps") and 22 U.S.C. § 3901(b)(2) ("fostering the development and vigorous implementation of policies and procedures, including affirmative action programs").

[11] This part [Part 21] does not prohibit the consideration of race, color, or national origin if the purpose and effect are to remove or overcome the consequences of practices or impediments which have been restricted the availability of, or participation in, the program or activity receiving

Although Subsection 7 "does not prohibit" race-conscious action, the AADA does *not* incorporate or refer to Subsection 7. The AADA's reference to rules then in effect under Title VI is specifically addressed to regulations regarding *enforcement* of Title VI, and not to other, substantive regulations such as Subsection 7. The enforcement rules referred to in the AADA are set forth under "Procedures for Effecting Compliance." *See* 49 C.F.R. § 21.13 ("Subsection 13"). Carrying out its authority under the AADA, DOT promulgated Compliance and Enforcement Regulations (Subpart E) to address violations of the DOT Regulations, including Subparts C and D. 49 C.F.R. §§ 23.73-23.87.[12] The AADA's general reference to Title VI enforcement rules does not express any congressional intent to incorporate Subsection 7. The plain language of the AADA does not refer to, authorize,

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> Federal financial assistance, on the grounds of race, color, or national origin. Where prior discriminatory practice or usage tends, on the grounds of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this part applies, the applicant or recipient must take affirmative action to remove or overcome the effects of the prior discriminatory practice or usage.

49 C.F.R. § 21.5(b)(7) ("Subsection 7").

[12] As directed by the AADA, DOT promulgated rules to enforce the DOT Regulations by adopting earlier rules promulgated to enforce Title VI. For example, investigations are to be "made pursuant to prescribed DOT Title VI investigation procedures." 49 C.F.R. § 23.73(b). Moreover, enforcement proceedings "are conducted in accordance with the Department's procedures for enforcing Title VI (49 CFR Part 21)." 49 C.F.R. § 23.83(a).

or even contemplate the race-conscious affirmative action program required by the DOT Regulations.

Even if the Court accepts the Eleventh Circuit's conclusion that the AADA's reference to Title VI rules incorporates Subsection 7, the DOT Regulations are nonetheless without the force and effect of law. There cannot be requisite statutory authority for a regulation if the statute purportedly granting the authority refers to another regulation which itself is not legislatively authorized. *See Chrysler Corp.*, 441 U.S. at 303. Thus, if Congress did not authorize Subsection 7 under the Civil Rights Act of 1964, the AADA's reference to that rule cannot provide authority for the DOT Regulations.

Title VI, which is the only stated authority for Subsection 7,[13] does not authorize or contemplate that regulation. Title VI is a facially-neutral "thou-shalt-not-discriminate" statute. *Groves*, 696 F. Supp. at 1484.[14] The legislative history of Title VI does not reflect that Subsection 7 was authorized or even contemplated.[15]

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[13] *See* 49 C.F.R. § 21.1.

[14] "The tendency to turn the language of laws that require racial neutrality — thou-shalt-not-discriminate laws — into authority for granting racial preference is twisting the plain meaning of statutes too far. In a different era a similar jurisprudential approach could turn the same laws into weapons in the hands of persecutors." *West*, 522 F. Supp. at 345.

[15] *See generally* 110 Cong. Rec. 6543-47; 1964 U.S. Code Cong. & Admin. News 2355-2519. There is not even a suggestion in the legislative history that Title VI could be used by administrative agencies as a basis for implementing race-conscious affirmative action programs. *See* Minority Report upon Proposed Civil Rights Act of 1963, Committee

Thus, even if the AADA's reference to Title VI rules incorporates Subsection 7, the DOT Regulations are without the force and effect of law because Subsection 7 is unauthorized.

In the AADA, Congress did not make any of the determinations regarded as critical to the statutory MBE provision upheld in *Fullilove*. 448 U.S. at 468. The use of the words "affirmative action" in the AADA is insufficient to authorize the DOT Regulations. The AADA's reference to enforcement rules under Title VI excluded Subsection 7. Even if the AADA referred to Subsection 7, the DOT Regulations are still unauthorized because Title VI did not authorize Subsection 7.

2. *The Constitutionality Of A Racial Preference Program Developed By An Administrative Agency Should Be Judged Under Strict Scrutiny.*

This Court has addressed the constitutionality of governmental racial preference classifications in the public contracting arena twice before, and these two cases create a gap into which this case falls.[16] In *Fullilove*, the Court heard a facial challenge to a racial classification expressly mandated by Congress and discussed the standard of equal protection review applicable to congressional race-based remedial measures. *Fullilove* also examined the degree to which Congress may exercise its unique remedial powers under Section 5 of the Fourteenth Amendment. In *Croson*, the Court prescribed the

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on Judiciary Substitute for H.R. 7152, 1964 U.S. Code Cong. & Admin. News at 2431, 2453-55.

[16] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

standard of review to be employed in determining the constitutionality of race-based remedies imposed by state or local governments.

In the more recent case of *Metro Broadcasting*, the Court reviewed certain minority preference policies of the Federal Communications Commission ("FCC") under an "intermediate" standard of review — whether the FCC minority preference policies serve an important governmental objective and whether they are substantially related to the achievement of that objective. *Metro Broadcasting* held that *Croson* did not prescribe the level of scrutiny to be applied to a racial classification employed by Congress and that "*Croson* cannot be read to undermine [the Court's] decision in *Fullilove*." 110 S.Ct. at 3009. Just as *Fullilove* turned on the fact that the set-aside program at issue was congressionally mandated, the Court in *Metro Broadcasting* found it to be "of overriding significance . . . that the FCC's minority ownership programs have been specifically approved — indeed, mandated — by Congress." *Id.* at 3008. The limited number of electromagnetic frequencies and the implication of First Amendment values also influenced the Court to relax the level of scrutiny under which the FCC's minority preference programs were analyzed.

In its decision, the Eleventh Circuit noted that "at least until 1989, no five members of the Supreme Court had agreed (at least in the same case) upon the proper standard for reviewing affirmative action programs." *Groves*, 920 F.2d at 765-66. In *Croson*, "a majority of the Court seemed to settle on a strict scrutiny standard for all government measures containing racial classifications." *Id.* at 766. Were it not for this Court's decision in *Metro*

Broadcasting, the Eleventh Circuit would have affirmed the district court's application of the strict scrutiny standard to the DOT Regulations. Although the Eleventh Circuit found that the issue was "hardly free of doubt," its reading of *Metro Broadcasting* led that court "to conclude that the Supreme Court would utilize an intermediate level of scrutiny in evaluating the DOT Regulations." *Id.* at 766.

Reading *Fullilove*, *Croson* and *Metro Broadcasting* together, the Eleventh Circuit held "that the Court has created a dual inquiry for evaluating affirmative action programs" and that there is a "clear demarcation between affirmative action programs developed by state and local governments and those developed at the direction of Congress." *Groves*, 920 F.2d at 767. According to the Eleventh Circuit, the first inquiry is to determine the source of an affirmative action program. If a state or local government has developed the program, a court must strictly scrutinize the program. However, if Congress has mandated an affirmative action program, "then an intermediate level of scrutiny is appropriate." *Id.*

Fullilove clearly distinguished an MBE program mandated by Congress from one developed by an administrative agency or by a local government. In *Fullilove*, a set-aside program under the Public Works Employment Act of 1977 (PWEA) was upheld against a facial challenge because Congress expressly mandated the 10% set-aside in the PWEA and Congress was owed deference in such matters due to its unique constitutional role in the enforcement of the post-Civil War

amendments.[17] Both the plurality opinion and Justice Powell's separate opinion in *Fullilove* note that Congress may legislate without making the same type of record and findings that are "appropriate to a judicial or administrative proceeding." *Fullilove*, 448 U.S. at 478, 502. In *Fullilove*, "Justice Powell made it clear that other governmental entities might have to show more than Congress before undertaking race-conscious measures: 'The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body.' [448 U.S.] at 515-516, n.14." *Croson*, 488 U.S. at 489. The teaching of *Fullilove* and *Croson* is that constitutionally acceptable means of redressing past discrimination vary with the powers of the governmental body enacting the legislation or promulgating the regulation.

Congress, unlike state and local legislative bodies or administrative agencies, is a national representative body which may legislate only upon the approval of both Houses and the concurrence of the President. Thus, Congress is more likely than other, more parochial, bodies to exercise its powers in ways that take into account the interests of all citizens. Additionally, Section 5 of the Fourteenth Amendment specifically empowers Congress

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[17] "Here we deal . . . not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." 448 U.S. at 483 (plurality opinion).

"to enforce, by appropriate legislation," the guarantee of equal protection set forth in Section 1 of that amendment. The reasons for giving greater deference to a congressional decision to establish a racial classification apply uniquely to Congress, and not to other components of the federal government

By contrast, an administrative agency such as DOT has no special competence or expertise in civil rights, and has no right to be accorded any greater deference than that afforded state and local governments. Neither *Fullilove* nor *Croson* nor *Metro Broadcasting* stand for the proposition that a federal administrative agency, acting under a general grant of authority to regulate a particular industry, is entitled to any special deference if it decides to classify on the basis of race. Although an administrative agency may "flesh out [the] skeleton, pursuant to delegated rule making authority," Congress itself must make the "critical determinations" regarding race-conscious programs. *Fullilove*, 448 U.S. at 468 (opinion of Burger, C.J.).[18]

Even if Congress had generally contemplated the DOT Regulations, Congress did not *mandate* a set-aside program of any type or in any fixed percentage. Further, in enacting the AADA, Congress made none of the determinations that the Court deemed to be "critical" in

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[18] *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 103, 114, n.46 (1976) (in light of discriminatory immigration policy, "it would be appropriate to require a much more explicit directive from either Congress or the President before accepting the conclusion that the political branches of Government would consciously adopt a policy raising the constitutional questions presented by this rule").

upholding the MBE provision challenged in *Fullilove*.[19] Neither Congress nor DOT mandated the 20% set-aside which Fulton County imposed on the airport project. Because the DOT is not entitled to any special deference, the DOT Regulations are subject to the strict scrutiny required by *Croson*.

3. *Metro Broadcasting Does Not Apply To Racial Preference Programs In Public Contracting.*

Under *Croson*, racial classifications in the public contracting arena should be viewed under the strict scrutiny standard to determine whether they pass constitutional muster. *Metro Broadcasting* does not require the DOT Regulations to be subjected to an intermediate scrutiny standard. In *Fullilove*, "six Members of the Court rejected intermediate scrutiny in favor of some more stringent form of review. Three Members of the Court applied strict scrutiny." *Metro Broadcasting*, 110 S.Ct. at 3032 (O'Connor, J., dissenting).[20] In addition, "*Fullilove* preceded [the Court's] determination in *Croson* that strict scrutiny applies to preferences that favor members of mi-

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[19] The following were deemed to be the critical determinations outlined in the PWEA: "the decision to initiate a limited racial and ethnic preference; the specification of a minimum level for minority business participation; the identification of the minority groups that are to be encompassed by the program; and the provision for an administrative waiver where application of the program is not feasible." 448 U.S. at 468.

[20] The plurality opinion in *Fullilove* specifically required any congressional race-conscious program to be "narrowly tailored" to achieve "the objective of remedying the present effects of past discrimination." 448 U.S. at 480. *See id.* at 490 ("Congress must proceed only with programs narrowly tailored to achieve its objectives").

nority groups, including challenges considered under the Fourteenth Amendment." *Id.*

Although Justice Stevens joined the opinion and the judgment of the Court in *Metro Broadcasting*, in a concurring opinion he indicated "that racial or ethnic characteristics provide a relevant basis for disparate treatment only in extremely rare situations." 110 S.Ct. at 3028 (Stevens, J., concurring). Justice Stevens stated that the minority preference policies of the FCC did not stigmatize either the favored or the disfavored class, and further stated that the case "falls within the extremely narrow category of governmental decisions for which racial or ethnic heritage may provide a rational basis for differential treatment." *Id.* In his concurring opinion in *Croson*, Justice Stevens noted that "race is not always irrelevant to sound governmental decision making. In the case of public contracting, however, if we disregard the past, there is not even an arguable basis for suggesting that the race of a subcontractor or general contractor should have any relevance to his or her access to the market." *Croson*, 109 S.Ct. at 731.

Justice Stevens' concurring opinions in *Croson* and *Metro Broadcasting* strongly indicate that *Metro Broadcasting* should not be applied to affirmative action programs in public contracting. Justice Stevens noted that, unlike the broadcasting context, affirmative action programs in the public contracting arena tend to stigmatize the preferred group and "exacerbate rather than reduce racial prejudice." 110 S.Ct. at 3028 and n.2 (Stevens, J., concurring) (citing *Fullilove*, 448 U.S. at 545 and n.17 and *Croson*, 488 U.S. at 516-17).

Justice Stevens' limiting language in *Metro Broadcasting* is appropriate because the bases upon which the Court upheld the FCC's minority preference policies in *Metro Broadcasting* are absent in the public contracting arena. First, the number of public contracting projects to be constructed with federal funds is virtually unlimited, compared to the limited number of broadcast licenses which can be awarded due to the scarcity of electromagnetic frequencies. Second, First Amendment principles are not implicated in public contracting. While diversity of views and information on the air waves may serve important First Amendment values, diversity for its own sake in public contracting does not serve any legitimate public interest. Rather, the interest to be served in public contracting is performance of the work by a qualified contractor at the lowest cost to the public.

4. *Implementation By Local Governments Of Racial Preference Programs Required by Federal Regulations Should Be Judged Under Strict Scrutiny.*

This Court has never considered the constitutionality of a state or local government's implementation of a federally-developed racial preference program in public contracting. *Fullilove* considered a facial challenge to an MBE program specifically mandated by Congress.[21] *Croson* involved a purely local set-aside program developed by the City of Richmond. The Court previously

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[21] In *Fullilove*, the Court noted that "the peculiarities of specific applications are not before us in this case. We are not presented here with a challenge involving a specific award of a construction contract or the denial of a waiver request; such questions as specific application must await future cases." *Fullilove*, 448 U.S. at 486.

granted certiorari in another case concerning local implementation of a federally-developed racial preference program. *H.K. Porter Co. v. Metropolitan Dade County*, 489 U.S. 1062 (1989), *granting cert. and vacating* 825 F.2d 324 (11th Cir. 1987). That case was remanded to the Eleventh Circuit for further consideration in light of *Croson*.

The Court's disposition of *Porter* suggests that five Justices would apply the strict scrutiny standard employed in *Croson* to local implementation of federally-developed racial preference programs.[22] In *Porter*, the congressional authority for Metropolitan Dade County's affirmative action plan was the Surface Transportation Assistance Act of 1978 ("STAA"). The STAA did not provide for an affirmative action program and did not require grant recipients to establish MBE goals in any set percentage.[23] Following STAA's enactment, the Urban Mass Transit Administration ("UMTA") of DOT required all state and local public bodies seeking federal financial assistance for the construction of highway and mass transportation projects to establish MBE affirmative action programs.

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[22] *Cf. Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 915 n.16 (D.C. Cir. 1989) (Silberman, J.), *rev'd. sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 2997 (1990).

[23] By contrast, amendments to the STAA expressly established 10% contracting goals for "socially and economically disadvantaged individuals." *See* Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2100; Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No.100-17, § 106(c)(1), 101 Stat. 145. Regulations promulgated under these Acts presume that specified groups classified by race or ethic origin are socially and economically disadvantaged. *See* 49 C.F.R. § 23.62.

Rather than prescribing a methodology for applicants to follow in setting the required percentage goals, UMTA entrusted the goal-setting responsibility entirely with the state and local public bodies seeking the federal funding. Thus, it was Metropolitan Dade County which established the 5% MBE participation requirement.[24]

As in *Porter*, the statute arguably authorizing the DOT Regulations in this case does not require federal grant recipients to establish any fixed percentage goals for MBE participation. In fact, the AADA does not specifically authorize DOT to promulgate any race-conscious remedy. The DOT Regulations do not require federal grant recipients to establish MBE participation goals in any fixed percentage. It was Fulton County, rather than Congress or DOT, which imposed a goal of 20% minority participation as a part of its 1982 Program.[25] This was the

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[24] "[W]e are troubled by MDC's decision to use the 5% figure without supporting or substantiating the figure with some sort of consideration of the 5% goal to the relevant labor market of MBE's available to participate in contract Y-621." *H.K. Porter Co. v. Metropolitan Dade County*, 825 F.2d 324, 332 (11th Cir. 1987).

[25] The Policy Statement included in its 1982 Program provided that the County's policy was "to increase minority participation in all public contracts." *See* Policy Statement, reproduced in Appendix at 1g. The County selected its MBE goal at a time when over "half of its total population (589,904) [was] non-white or minority (303,509)." *See* Policy Statement. Three identified goals for the completion of the airport project were: "economy of costs; completion by a date certain and the active involvement of minorities." The Policy Statement further provided in part:

> Regarding the last goal, the county is interested in, and committed to, participation of minorities in ownership roles; (i.e., subcontracts) as opposed to having the minority

same percentage goal which Fulton County had already required for all County contracts.

Both *Fullilove* and *Croson* recognize that Congress' identification of a national problem does not provide a basis for implementing a race-conscious affirmative action program at the local level absent an additional showing that each local application is genuinely limited to those who have actually been harmed by prior local discrimination. Because national programs of the type analyzed in *Fullilove* must "explicitly recogniz[e] that the scope of the problem would vary from market area to market area," each locale must "identify the discrimination it seeks to remedy in its own jurisdiction." *Croson*, 488 U.S. at 504.

Chief Justice Burger's opinion in *Fullilove* stressed two factors in upholding the facial validity of the set-aside mandated by the PWEA. First, Congress was exercising its unique remedial powers under Section 5 of the Fourteenth Amendment. "The second factor emphasized by the principal opinion in *Fullilove* was the flexible nature of the 10% set-aside." *Id.* at 488.[26]

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participation goal being achieved through a prime contractor's staff, or the hiring of salaried minorities to perform the labor.

The County would prefer that the bidder strive for the largest feasible Minority Business Ownership Participation in all contracts and seek to achieve a goal of not less than twenty percent (20%) overall involvement of such firms.

[26] Two "congressional assumptions" which underlay the MBE program "could be 'rebutted' by a grantee seeking a waiver of the 10% requirement. *Id.* at 487-88, 100 S.Ct., at 2779-2780. Thus a waiver could be sought where minority businesses were not available to fill the 10%

Due to the facial nature of the challenge in *Fullilove*, the Court did not address questions of specific application of the statute, including the question of whether general congressional findings were sufficient to relieve a grantee of federal funds, such as the County, from establishing a legitimate basis for imposing an MBE set-aside in its own jurisdiction. *Metro Broadcasting* does not address the standard of scrutiny which should be utilized in analyzing a local government's implementation of an affirmative action program. Thus, even if the Court determines that the DOT Regulations are to be analyzed under less than strict scrutiny, the Court still needs to consider the standard of review to be applied to fixed percentage MBE programs established by local governments in the absence of any federal mandate or other directive.

The County's 1982 Program should be viewed under strict scrutiny. Otherwise, local governments such as the County could rely upon a general grant of authority to establish high percentage racial set-asides without establishing a compelling need to remedy prior discrimination and without narrowly tailoring the set-aside program to accomplish the remedial objective. In this case, the County cannot be viewed as an instrumentality of the federal government and cannot be accorded the deference that *Fullilove* and the Fourteenth Amendment reserve for Congress. *Fullilove* did not

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requirement or, more importantly, where an MBE attempted 'to exploit the remedial aspects of the program by charging an unreasonable price, *i.e.*, a price not attributable to the present effects of prior discrimination.' *Id.*, at 488, 100 S.Ct., at 2780. The Chief Justice indicated that without this fine tuning to remedial purpose, the statute would not have 'pass[ed] muster.'" *Croson*, 488 U.S. at 489.

specify the level of scrutiny to be applied to local implementation of a national MBE program, whereas *Croson* established that state and local governments' implementation of MBE programs must be analyzed under strict scrutiny. The Court should use this case to confirm that strict scrutiny is the standard by which any race-conscious preference program not specifically mandated by Congress will be judged.

CONCLUSION

The court of appeals erred in applying *Metro Broadcasting* in the context of public contracting and in holding that the DOT Regulations should be analyzed under "intermediate" scrutiny merely because federal regulations were involved. Congress did not authorize or require the DOT to develop a race-conscious affirmative action program to be imposed on all state and local government grantees of federal funds. Federal agencies and local governments are not entitled to the deference owed Congress in enforcing the equal protection guarantees of the Fourteenth Amendment. For the foregoing reasons, the requested writ of certiorari should issue and the judgment of the court of appeals should be reversed with respect to the issues raised in this petition.

Respectfully submitted,

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April 1991

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90-1562

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

S.J. GROVES & SONS COMPANY AND
JASPER CONSTRUCTION COMPANY,
Petitioners,
v.
FULTON COUNTY, GEORGIA,
Respondent.

APPENDIX OF PETITIONERS

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April 1991

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Appendix A

S.J. GROVES & SONS COMPANY and
Jasper Construction Company,
Plaintiffs-Appellees,

v.

FULTON COUNTY,
Defendant-Appellant,

U.S. Department of
Transportation, Defendant.

S.J. GROVES & SONS COMPANY and
Jasper Construction Company,
Plaintiffs-Appellees,

v.

FULTON COUNTY,
Defendant-Cross-Claim
Plaintiff-Appellant.

S.J. GROVES COMPANY and Jasper
Construction Company,
Plaintiffs-Appellees,

v.

FULTON COUNTY,
Defendant-Cross-Claim
Plaintiff-Appellant,

United States Department of Transportation and
James H. Burnley, IV, Secretary, United States
Department of Transportation, Defendant-
Cross-Claim Defendants-Appellees.

S.J. GROVES & SONS COMPANY and Jasper Construction Co., Inc., Plaintiffs-Appellees,

v.

FULTON COUNTY, Defendant-Appellant,

United States Department of Transportation, James H. Burnley, IV, Secretary, United States Department of Transportation, Defendants-Appellees.

Nos. 86–8105, 88–8536, 88–8573 and 88–8700.

United States Court of Appeals, Eleventh Circuit.

Jan. 7, 1991.

Appeals from the United States District Court for the Northern District of Georgia.

Before KRAVITCH and COX, Circuit Judges, and DYER, Senior Circuit Judge.

COX, Circuit Judge:

I. FACTS AND PROCEDURE

A. *Facts*

The Federal Aviation Administration (FAA) of the Department of Transportation (DOT) has designated Fulton County Airport (also known as Brown Field) a "reliever" airport. This means that it is an alternative destination for freight and cargo flights away from the primary passenger airport in the area, Hartsfield International Airport. In 1981, the FAA determined that the instrumented runway at Fulton County Airport was in "rapidly deteriorating condi-

tion." District Court Order, Sept. 30, 1985, R.6-103-2. The FAA threatened to close the runway, which would have resulted in the airport losing its status as a reliever airport. *Id.*

In order to avoid this result, the Fulton County Board of Commissioners decided that the runway should be repaired. The County applied for a grant from the FAA under the Airport and Airway Development Act of 1970, as amended (AADA). Under a program created by that statute, the federal government would fund ninety percent of the project, the state of Georgia would fund five percent, and Fulton County would fund five percent. As a condition of receiving the grant, Fulton County was required to develop and submit for approval to the FAA an MBE (Minority Business Enterprise)[1] program for the project. The program had to meet the requirements set forth in regulations promulgated by the Department of Transportation (the DOT regulations). These regulations are set out at 49 C.F.R. § 23.1-23.55.

Fulton County developed an MBE program (the specifics of the program are discussed in Part III of this opinion), and the FAA approved it and awarded the funds to the County. Once the funds were received, the County invited bids from contractors. S.J. Groves & Sons, Co. (Groves)[2] submitted a timely bid of $818,432.40, the lowest

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[1] Minority Business Enterprise (MBE) is defined in slightly different ways, depending on the statute or program at issue. For purposes of this opinion, we will use the definition found at 49 C.F.R. § 27.5:

> a small business concern ... which is owned and controlled by one or more minorities or women.

[2] Jasper Construction Company is a wholly-owned subsidiary of Groves. Both are Minnesota corporations with their principal place of business in Minneapolis, Minnesota.

bid the County received. The Groves bid included MBE participation of 4.15%.[3] The County Commission awarded the contract to Groves, on condition that it make a good faith effort to increase the level of its proposed MBE participation. The extent of Groves's good faith efforts to increase MBE participation is disputed. The County Commission decided Groves had not in good faith attempted to increase MBE participation and awarded the contract to the second-lowest bidder, Dickerson, Inc., whose bid contained an MBE participation level of 10%. The award was again conditioned on good faith efforts to increase MBE participation. Dickerson was able to increase MBE participation to 16% within two days. The Commission then permanently awarded the contract to Dickerson.

B. *Procedural History*

The protracted procedural history of this case began in August 1982 when Groves, after an unsuccessful attempt to obtain equitable relief, filed a complaint against Fulton County in the district court for the Northern District of Georgia. Subject matter jurisdiction was grounded in diversity.

Subsequently, the district court permitted Groves to file five amended complaints. Groves alleges the following: Count I — Fulton County breached its promise as contained in the invitation to bid by not awarding the contract to the lowest bidder; Count II — Fulton County had no authority to promulgate the MBE program because it conflicts with the Georgia low-bid statute, and the MBE program is therefore invalid; Count III — the MBE program is unconstitu-

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[3] "MBE participation" is defined by reference to the total dollar value of a bid in relation to the dollar value proposed to be sublet to MBEs.

tional under the Georgia Constitution; Count IV — the MBE program violates Title VI of the Civil Rights Act of 1964; Count V — the MBE program violates the equal protection component of the Fourteenth Amendment of the federal Constitution; Count VI — Fulton County's 1984 MBE resolution,[4] on its face, violates the equal protection component of the Fourteenth Amendment; Count VII — the 1984 MBE Resolution, on its face, violates the Georgia low-bid statute; Count VIII — the 1984 MBE Resolution, on its face, violates Title VI.[5] Counts IX and X — the DOT regulations violate, *inter alia*, the equal protection component of the Fifth Amendment of the federal Constitution.[6] Groves seeks damages on Counts I through V and equitable relief on Counts VI through X.

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[4] Counts VI, VII and VIII were originally facial attacks on Fulton County's 1979 MBE Resolution. The 1979 Resolution "called for a goal of twenty percent participation by [MBEs] in all county and procurement contracts." District Court Order, Sept. 30, 1985, R. 6-103-1. After the County replaced the 1979 Resolution with the 1984 MBE Resolution, Groves amended its complaint to reflect the change. Fulton County developed the 1982 program challenged in this appeal "solely to comply with the regulatory requirements[; the program is] not related in any way to the 1979 Resolution." *Id.* at 3.

[5] Jasper Construction Company is a plaintiff in Counts VI through VIII because of its alleged involvement in Fulton County construction work and the alleged injury to it caused by the 1984 MBE Resolution.

[6] Although the Fifth Amendment does not contain an equal protection clause, its due process clause incorporates the equal protection element prohibiting racial discrimination to the same extent as the equal protection clause contained in the Fourteenth Amendment prohibits such discrimination. *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976).

The district court, over the course of several years,[7] issued three separate orders in this case. Each order resulted from cross-motions for summary judgment. These orders are now before us on interlocutory appeal. Following is a brief summary of the district court's resolution of each count. More detailed discussion of the district court's findings and orders will accompany our discussion of the issues.

First, the district court denied summary judgment on Count I because Groves's good faith efforts to meet the MBE requirements on the airport project contract are disputed. Second, the court granted summary judgment in favor of Groves on Counts VI through VIII because the court found that "the actions of Fulton County in enacting the airport program and the 1984 [MBE] Resolution violate Georgia's low-bid statute." District Court Order, Sept. 30, 1985, R. 6-103-24. The County was enjoined from enforcing the 1984 Resolution. Next, the court held the DOT regulations violate the equal protection component of the Fifth Amendment and are therefore unconstitutional. Therefore, summary judgment was entered in favor of Groves on Counts IX and X.[8] Finally, the district court granted summary judgment for

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[7] The delays in this case seem to have been caused primarily by extensive discovery and by the district court's prudent request for additional briefing on the effect of the Eleventh Circuit's opinion in *H.K. Porter Co. v. Metropolitan Dade County*, 825 F.2d 324 (11th Cir.1987), *vacated*, 489 U.S. 1062, 109 S.Ct. 1333, 103 L.Ed.2d 804 (1989), on this case. The district court decided *Porter* did not affect its disposition of the issues in this case. *See* District Court Order, Apr. 22, 1988, R. 3-188-6. The Supreme Court subsequently vacated our opinion in *Porter*. *H.K. Porter Co. v. Metropolitan Dade County*, 489 U.S. 1062, 109 S.Ct. 1333, 103 L.Ed.2d 804 (1989).

[8] The DOT dismissed its appeal of this order after the Supreme Court rendered its decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469,

Groves on Counts II, IV and V. Because the DOT regulations are unconstitutional, the court ruled, they cannot preempt the Georgia low-bid statute. Further, Fulton County had no other defense to its violation of the state statute, and the court consequently held the County liable to Groves.[9]

II. PARTIES' CONTENTIONS AND ISSUES ON APPEAL

Essentially, Groves complains of two things Fulton County has done. First, Groves claims the County's 1984 MBE Resolution is not authorized by state or federal law and puts Groves at a disadvantage in bidding on Fulton County public works projects. Therefore, the injunction preventing enforcement of the resolution should be affirmed. Second, Groves claims it should have been awarded the airport paving contract pursuant to the Georgia low-bid statute. Fulton County awarded the contract to another bidder, Groves asserts, based on an unconstitutional MBE program that the County had no authority to enact.

Fulton County argues that Groves lacks standing to challenge the 1984 Resolution and that regardless, the resolution is constitutional. The County further contends that it is authorized by the low-bid statute to take compliance with MBE requirements into account in awarding contracts. Finally, the County asserts that even if it did violate the low-bid statute, it has a valid defense that prohibits a finding of liability to Groves.

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109 S.Ct. 706, 102 L.Ed.2d 854 (1989). Therefore, Fulton County is the only appellant in this case.

[9] The court found it unnecessary to reach the Georgia constitutional question and denied summary judgment on Count III.

We are called upon in this appeal to resolve the following issues. First, does Groves have standing to challenge the County's 1984 MBE Resolution, and if it does, is the resolution constitutional. Second, in awarding the 1982 airport project contract to a bidder other than Groves, did the County violate the Georgia low-bid statute. Finally, if the County did transgress state law, does it have a valid defense to the violation.

III. DISCUSSION

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R. Civ.P. 56(c).

A. *The 1984 MBE Resolution*

In 1979, Fulton County enacted a resolution that called for a goal of twenty percent participation by MBEs in all county contracts (the 1979 MBE Resolution). The County Commission decided to update the resolution and directed Clarence Reid, the County's affirmative action officer, to conduct a study of MBE participation in Fulton County contracts. After conducting personal meetings, compiling data and reviewing similar programs instituted by other local governments, as well as by the Metro Atlanta Rapid Transit Authority, the Reid study concluded that MBE participation in County contracts was disproportionately low. The cause of the problem, according to the study, was systemic racial discrimination.

In 1984, the County Commission ordered the County Manager to develop an MBE program to replace the 1979

MBE Resolution. The County enacted such a program on June 6, 1984 (the 1984 MBE Resolution). The program retained the twenty percent MBE participation goal. Groves asserts the district court was correct in awarding declaratory and injunctive relief in Groves's favor. Groves asserts the 1984 Resolution injures it and is unconstitutional and therefore the district court's order awarding declaratory and injunctive relief in Groves's favor should be affirmed.

1. *Standing*

Fulton County contests Groves's standing to attack the 1984 MBE Resolution. Standing is a jurisdictional prerequisite to a suit in a federal court. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475-76, 102 S.Ct. 752, 760-61, 70 L.Ed.2d 700 (1982). The district court determined Groves has standing to challenge the resolution. *See* R. 6-103-27.

There is no dispute regarding the facts relevant to the standing question. We therefore must review the law of standing and determine if Groves has standing to challenge the 1984 Resolution under the facts of this case. A litigant has standing when the party has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult constitutional questions . . . ." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962).

The Supreme Court has developed an analytical framework that is useful in solving standing questions. Under this framework, the standing doctrine has two components: "irreducible" constitutional requirements and pru-

dential considerations. *Valley Forge Christian College*, 454 U.S. at 472, 102 S.Ct. at 758; *FDIC v. Morley*, 867 F.2d 1381, 1386 (11th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 75, 107 L.Ed.2d 41 (1990). To satisfy the standing doctrine's constitutional component, a litigant must demonstrate three elements. First, the party must have suffered an actual injury or show the imminence of such injury. *Valley Forge Christian College*, 454 U.S. at 472, 102 S.Ct. at 758; *E.F. Hutton & Co. v. Hadley*, 901 F.2d 979, 984 (11th Cir.1990); *Morley*, 867 F.2d at 1386. Second, the injury must be "fairly traceable to the challenged conduct." *Valley Forge Christian College*, 454 U.S. at 472, 102 S.Ct. at 758; *E.F. Hutton*, 901 F.2d at 984; *Morley*, 867 F.2d at 1386. Third, the party must demonstrate that a favorable decision likely will redress the injury. *Valley Forge Christian College*, 454 U.S. at 472, 102 S.Ct. at 758; *E.F. Hutton*, 901 F.2d at 984; *Morley*, 867 F.2d at 1386.

After satisfying the constitutional component of the standing doctrine, a party must show that "prudential considerations do not favor judicial restraint from hearing such action." *Morley*, 867 F.2d at 1386. The Supreme Court has listed three considerations that discourage judicial action despite a party's satisfaction of all three constitutional requirements: (1) assertion of a third party's rights; (2) allegation of a generalized grievance instead of an injury peculiar to the litigant; and (3) assertion of an injury outside the statute's or constitutional provision's zone of interests. *Valley Forge Christian College*, 454 U.S. at 474-75, 102 S.Ct. at 759-60; *Morley*, 867 F.2d at 1386.

a. *Actual or Imminent Injury*

Groves contends the existence of the 1984 Resolution presents two threatened injuries sufficient to satisfy consti-

tutional requirements. The district court found that Groves is a large, national contractor that can often complete contracts with little or no subcontracting. District Court Order, Sept. 30, 1985, R. 6-103-26. Therefore, Groves argues, forcing compliance with the 1984 Resolution's criteria, including its 20% MBE participation goal, will require unnecessary subcontracting. Groves's first claimed injury, then, is a threatened loss of potential profits. If Groves were awarded a Fulton County construction contract, Groves asserts its profit margin on that contract would be smaller than Groves's profit margins on contracts with government entities that do not have MBE programs. Groves's second claimed injury is a "lost opportunity, strictly on the basis of race, to compete equally with other contractors for Fulton County projects." Appellee's Brief, No. 86-8105 at 9.

To have standing, a litigant must have suffered or be in imminent danger of suffering a "distinct and palpable injury" instead of an "abstract" or "conjectural" injury. *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 *reh'g denied*, 468 U.S. 1250, 105 S.Ct. 51, 82 L.Ed.2d 942 (1984) (citations omitted); *Morley*, 867 F.2d at 1387. The injury or threat of injury "must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' " *Pollard v. Cockrell*, 578 F.2d 1002, 1006 (5th Cir.1978) (*quoting O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974)).[10]

Groves's second claimed injury, lost opportunity to compete on an equal basis with other bidders, is not a cognizable Article III injury. Nothing in the 1984 Resolution

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[10] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

prevents Groves from bidding on any Fulton County contract under the same terms as any other bidder. Therefore, Groves *is* able to compete with other bidders on an equal basis. Were we to agree with Groves's reasoning regarding this so-called injury, then bidders subject to any universally applicable requirements (e.g. time of bid, manner of bid, place of bid) would allege injury sufficient to satisfy the standing requirement.

We reach the same conclusion, for different reasons, regarding Groves's first claimed injury, loss of potential profits. We find the Supreme Court's opinion in *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), controlling on this point. In *Warth*, Rochester Home Builders Association (Home Builders) sought to intervene in a suit challenging the town of Penfield's zoning ordinance. Home Buildings alleged that the zoning ordinance "had deprived some of its members of 'substantial business opportunities and profits.' " *Id.* at 515, 95 S.Ct. at 2213. The Court decided that Home Builders did not have standing to seek equitable relief. "The complaint refers to no specific project of any of its members that is currently precluded either by the ordinance or by [the town of Penfield's] action in enforcing it. There is no averment that any member has applied to [Penfield] for a building permit or a variance with respect to any current project." *Id.* at 516, 95 S.Ct. at 2214.

Similarly, Groves has pointed to no contract it was denied because of the 1984 Resolution. Nor has Groves alleged it has ever bid for a single contract that was subject to the resolution. Groves points to Fulton County's denial of the airport project contract because of the 1982 MBE Program. Because the district court found that the 1982 Program was in no way related to the 1984 Resolution (District Court Or-

der, Sept. 30, 1985, R.6-103-3), this allegation is insufficient to satisfy the injury requirement of the standing doctrine.

The case law cited by Groves is likewise anavailing. Some of these cases involve situations where contracts were set aside for minority bidders only. *See Investment Co. Institute v. FDIC*, 815 F.2d 1540, 1543 (D.C.Cir.), *cert. denied*, 484 U.S. 847, 108 S.Ct. 143, 98 L.Ed.2d 99 (1987) (FDIC rule dealt petitioners competitive injury by allowing insured nonmember banks to enter the securities field indirectly through subsidiaries and affiliates); *Ray Baillie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696, 699-701 (5th Cir.), *reh'g denied*, 478 F.2d 1403 (5th Cir.1973), *cert. denied*, 415 U.S. 914, 94 S.Ct. 1410, 39 L.Ed.2d 468 (1974) (SBA program at issue authorized SBA to set aside contracts for placement with small businesses owned by disadvantaged persons; plaintiff not allowed to compete for contract in question; recipient of contract received premium price not available to non-disadvantaged businesses). That is not the case here; the 1984 Resolution permits Groves to bid for all Fulton County contracts. Other cases cited by Groves present much more concrete injuries than the injury Groves asserts in this case. *See Uzzell v. Friday*, 592 F.Supp. 1502, 1514 (M.D. N.C.1984) (plaintiffs had standing because they were denied the opportunity to compete on an equal basis with other members of the student body); *Rhode Island Chapter, Associated Gen. Contractors of America, Inc. v. Kreps*, 450 F.Supp. 338, 346-47 n. 3 (D.R.I.1978) (some contractors lost contracts they would have been awarded but for the MBE program); *Wright Farms Constr., Inc. v. Kreps*, 444 F.Supp. 1023, 1027 (D.Vt.1977) (plaintiff presented uncontroverted evidence that but for the MBE program, it would have received public works contracts).

The only case Groves cites that directly supports its position is *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971). That case is of questionable authority, however, for two reasons. First, it predates *Warth*. Second, the opinion cites *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), to support the proposition that contractors who have not bid on projects that are subject to MBE requirements and have not identified specific projects they wish to bid on may still establish standing. However, *Abbott Laboratories*, in the standing context, stands for the proposition that a drug manufacturer need not expose itself to FDA sanctions in order to establish standing. *Id.* at 154, 87 S.Ct. at 1518. Groves is not in a similar position of having to expose itself to potential sanctions in order to establish standing.[11]

Because Groves fails to satisfy the first constitutional requirement of standing, injury, a discussion of the other two constitutional requirements, causation and redressability, is unnecessary. Likewise, an examination of the standing doctrine's prudential component would be superfluous. We will vacate the district court's order and judgment on Counts VI through VIII and remand with instructions to dismiss the claims presented by those counts for lack of

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[11] Groves also cites *Associated General Contractors of California v. Secretary of Commerce*, 441 F.Supp. 955 (C.D.Cal.1977), *vacated, Los Angeles County v. Associated Gen. Contractors*, 438 U.S. 909, 98 S.Ct. 3132, 57 L.Ed.2d 1153 (1978). There, the complaining contractors had not bid on any projects, but had at least identified specific projects they wished to bid on. *Id.* at 963. To the extent the cited case stands for the proposition that under circumstances similar to this case contractors need not bid on any project in order to show injury, we think the case was incorrectly decided.

standing. We now proceed to a discussion of Groves's claim that Fulton County violated the Georgia low-bid statute by creating the 1982 MBE program and relying on it in not awarding the airport project contract to Groves.

B. *The 1982 MBE Program*

Fulton County does not contest Groves's standing to challenge the 1982 MBE Program. Nor could it because Groves clearly has standing to attack the program because it was denied the contract for the airport project because of its alleged failure to make a good faith attempt to meet the program's MBE goals. The district court found that Fulton County developed the 1982 Program for one purpose only: to comply with DOT regulations in order to obtain a grant under the AADA. District Court Order, Sept. 30, 1985, R.6-103-3. Fulton County's claim that the 1982 Program is valid is therefore bottomed on its assertion that the DOT regulations are constitutional.

1. *The DOT Regulations*

A good summary of the DOT regulations is found in the district court's March 30, 1987, order, *S.J. Groves & Sons Co. v. Fulton County*, 696 F.Supp. 1480, 1482-83 (N.D.Ga.1987):

> DOT's regulation entitled "Participation by Minority Business Enterprise in Department of Transportation Programs" is found at 49 C.F.R. § 23.01 *et seq.*[12] The regulation defines minority as follows:

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[12] On May 17, 1979, DOT issued a Notice of Proposed Rule Making (NPRM) for the MBE regulation. 44 Fed.Reg. 28928. A final rule was issued March 31, 1980. 45 Fed.Reg. 21172. On March 3, 1981, DOT issued an

"Minority" means a person who is a citizen or lawful permanent resident of the United States and who is:

(a) Black (a person having origins in any of the black racial groups of Africa);

(b) Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race);

(c) Portuguese (a person of Portuguese, Brazilian, or other Portuguese culture or origin, regardless of race);

(d) Asian American (a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands);

(e) American Indian and Alaskan Native (a person having origins in any of the original peoples of North America); or

(f) Members of other groups, or other individuals, found to be economically and socially disadvantaged by the Small Business Administration under section 8(a) of the Small Business Act, as amended (15 U.S.C. § 637(a)).

NPRM to amend one provision of the MBE regulation. 46 Fed.Reg. 16282. The regulation was promulgated in its present form as a final rule on April 27, 1981. 46 Fed.Reg. 23457.

49 C.F.R. § 23.5. "Minority business enterprise" or "MBE" is defined as "a small business concern ... which is owned and controlled by one or more minorities or women." *Id.*

The MBE regulation requires recipients of DOT funds (state and local governments) to implement an MBE program incorporating certain specific features. The regulation does not set a uniform percentage goal but leaves it to the recipients to do so. Among the required components of MBE programs are the following:

> (a) A policy statement expressing a commitment to use MBEs in all aspects of contracting to the maximum extent feasible;
>
> (b) The designation of an MBE liaison officer;
>
> (c) Affirmative action techniques to facilitate MBE participation in contracting, including the following:
>
> > (1) arranging solicitations, time for the presentation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation of MBEs;
> >
> > (2) providing assistance to MBEs in overcoming barriers such as the inability to obtain bonding,

financing, or technical assistance; and

(3) carrying out information and communications programs on contracting procedures and specific contracting opportunities in a timely manner, with such programs being bilingual where appropriate.

(d) Encouraging the use of banks owned or controlled by minorities or women;

(e) Making an MBE directory available to bidders;

(f) Certification of the eligibility of MBEs by the recipient, to ensure that the MBE program benefits only firms owned and controlled by minorities;

(g) Establishing percentage goals for the dollar value of work to be awarded to MBEs, including overall goals and goals on each specific prime contract with subcontracting possibilities; overall goals are to be based on a projection of the number and types of MBEs likely to be available to compete for contracts; goals for specific contracts are to be based on the known availability of qualified MBEs; and

(h) A requirement that bidders who do not meet the MBE contract goals satisfy

the recipient that the bidder has made "good faith efforts" to meet the goals.[13]

See 49 C.F.R. § 23.45.

Finally, the regulation includes a provision allowing exemptions from the above-listed requirements if "the particular situation is exceptional" and if "the modified program complies substantially" with the regulations. *Id.* § 23.41(f).

2. *The 1982 MBE Program Violates the Georgia Low-Bid Statute*

The district court decided that Georgia law does not give Fulton County the authority "to enact race-conscious contracting requirements." District Court Order, Sept. 30, 1985, R.6-103-12. Our review of Georgia law leads us to the same conclusion.

Fulton County argues that its 1982 MBE Program "merely adds another element of responsiveness and responsibility that must be satisfied by a bidder in the competitive bidding process," (Appellant's Brief in No. 86-8105 at 37)[14] and that the County had authority to enact the program.

The Georgia low-bid statute provides as follows:

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[13] The regulation does not define what constitutes "good faith efforts," but instead leaves the determination to the recipient. In Appendix A to subpart C of the regulation DOT provides a list meant to suggest the kinds of efforts recipients might consider.

[14] The County actually makes this argument in connection with its 1984 Resolution. Logically, however, the County is obliged to make the same argument with regard to the 1982 Program.

> Whenever it becomes necessary to build or repair any courthouse, jail, bridge, causeway, or other public works in any county, the county governing authority shall cause the same to be built or repaired by letting out the contract therefor to the lowest bidder, at public outcry, before the courthouse door, after having advertised the letting of the contracts, ... provided that such county authorities shall have authority to reject any and all bids at the public letting. If, in their discretion, the public interest and economy require it, the county authorities may build or repair any public buildings, bridges, causeways, or other public property in the county by contract or sealed proposals, ...

O.C.G.A. § 36-10-2 (Supp.1990).[15]

No Georgia case has dealt directly with the issue of a county's authority to enact an MBE program. However, one Georgia case involves an analogous situation. *Georgia Branch, Associated General Contractors of America, Inc. v. City of Atlanta*, 253 Ga. 397, 321 S.E.2d 325 (1984), involved a challenge to Atlanta's MBE program. The Atlanta program, except for differences in MBE participation goals, was very similar to the Fulton County MBE program at issue here. A group of contractors attacked the program as violative of Georgia and federal law. A unanimous Supreme Court of Georgia decided that the City lacked authority to enact such a program, and therefore avoided reaching the plaintiffs' constitutional claims. In so doing, the court interpreted a provision in the Atlanta City Charter, Ga.Code Ann. § 6-402,

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[15] Effective March 30, 1989, the word "responsible" was inserted after the word "lowest" in the first sentence.

that required the awarding of public works contracts to the "lowest and/or best bidder." The court stated that "the legislative purpose [of the requirement] was to further the cause that contracts be awarded without favoritism to obtain reasonable quality at the lowest cost." *Id.* at 399, 321 S.E.2d at 328. Because the Atlanta MBE program conflicted with this purpose (i.e., it sometimes required the awarding of a contract, on the basis of race, to a bidder who was not the lowest qualified bidder) the program was declared void. *Id.*

The County argues that *Georgia Branch* is distinguishable because the opinion did not discuss the Georgia low-bid statute and because the low-bid statute contains different language than the Atlanta Charter provision at issue in *Georgia Branch*. We have already indicated that no Georgia case is directly on point, but for several reasons we believe *Georgia Branch* gives us a good indication of how a Georgia court would rule on this question. First, the Supreme Court of Georgia did not discuss the Georgia low-bid statute in *Georgia Branch* for the obvious reason that it is inapplicable to cities—it applies to counties only. Second, the language "lowest and/or best bidder" is quite similar to "lowest bidder." Third, in reaching its conclusion, the court in *Georgia Branch* discussed another Georgia case and several cases from other jurisdictions which had dealt with somewhat different language, in some instances language closer to the language found in the Georgia low-bid statute. *See Associated Gen. Contractors of California v. San Francisco Unified School Dist.*, 616 F.2d 1381 (9th Cir.1980) ("lowest responsible bidder"); *Arrington v. Associated Gen. Contractors of America, Alabama Branch*, 403 So.2d 893 (Ala.1981), *cert. denied*, 455 U.S. 913, 102 S.Ct. 1265, 71 L.Ed.2d 453 (1982) (same); *City of*

Inglewood-L.A. County Civic Center Auth. v. Superior Court, 7 Cal.3d. 861, 103 Cal. Rptr. 689, 500 P.2d 601 (1972) (same); *Hilton Constr. Co. v. Rockdale County Bd. of Educ.*, 245 Ga. 533, 266 S.E.2d 157 (1980) ("the responsible bidder submitting the lowest acceptable bid").

The County also argues that the low-bid statute, by its terms, allows the County to reject "any and all bids"; therefore, the County may reject a bid based on a failure to meet MBE requirements. This argument is again refuted by Georgia case law. *Manly Building Co. v. Newton*, 114 Ga. 245, 40 S.E. 274 (1901), is the seminal case discussing the low-bid statute. The *Manly* court noted that the original statute had no provision in it for rejecting any and all bids, nor did it allow for sealed bids. *Id.* at 249, 40 S.E. at 276. In 1881, the statute was amended to add these provisions. *Id.* at 249-50, 40 S.E. at 276. A unanimous Georgia Supreme Court in discussing the meaning of the statute noted:

> The plain meaning of the first section of the act as amended is, that county authorities may, after due advertisement, cause a court-house to be built by letting out the contract therefor to the lowest bidder at public outcry before the court-house door, or they may advertise for sealed proposals for the erection of the building, and let the contract thereunder. They may do either in the first instance; *or they may, if they have undertaken to let the contract to the lowest bidder before the court-house door and have rejected all bids, then proceed to advertise for sealed proposals.*

Id. at 251, 40 S.E. at 277 (emphasis added). The court went on to explain:

> The provision allowing the county to reject any and all bids was found to be necessary, we suppose, because of the fact that, by a combination between bidders at a public letting, the county might be forced to pay a price largely beyond the value of the work, ... hence for the protection of a county, came the enactment of the provision giving the right to reject any and all bids at such letting.

Id. at 250, 40 S.E. at 276. Therefore, the purpose of the "any and all" provision was to protect a county against collusion by contractors at a public letting. The provision was not intended to allow a county to reject sealed low bids submitted by qualified contractors.

Indeed, the purpose of the statute, we believe, is the same as the Atlanta City Charter provision construed in *Georgia Branch*: to "insure the interest of the public in having contracts awarded without favoritism so that projects will be done . . . without excessive cost, and constructed at the lowest price consistent with the reasonable quality and expectation of completion." *Georgia Branch*, 253 Ga. at 399, 321 S.E.2d at 327 (*quoting City of Inglewood–L.A. County Civic Center Auth. v. Superior Court*, 7 Cal. 3d 861, 103 Cal. Rptr. 689, 692, 500 P.2d 601, 605 (1972). Other Georgia cases have similarly emphasized that the purpose of the statute is to obtain quality work at the lowest possible cost. *See, e.g., Mark Smith Constr. Co. v. Fulton County*, 248 Ga. 694, 285 S.E.2d 692 (1982); *Hilton Constr. Co. v. Rockdale County Bd. of Educ.*, 245 Ga. 533, 266 S.E.2d 157 (1980).

The County makes a final argument that it had authority to enact the program under its home rule charter, which is found in the Georgia Constitution. It reads as follows:

> The governing authority of each county shall have legislative power to adopt ... resolutions ... for which no provision has been made by general law and which is not inconsistent with this constitution or any local law applicable thereto.

Ga. Const. art. IX, § 2, par. 1. Because provision has been made by general law for the letting of public works contracts, and the Fulton County MBE Program conflicts with that general law, the home rule charter does not authorize the County to enact the program.

Finally, we note that in 1986 the Georgia legislature enacted O.C.G.A. § 36-10-2.1, which permits Georgia counties of a certain size to consider compliance with an MBE program as an element of a bidder's responsibility.[16] Fulton County argues the enactment of this statute affirms the County's authority to take MBE compliance into account in letting contracts prior to 1986. Groves asserts the enactment of the statute proves the County did *not* have such authority before 1986. We agree with neither position. The enactment of a statute by a Georgia legislature in 1986 sheds no light on the intent of a nineteenth-century Georgia legislature.

3. *Fulton County's Defenses*

Because Fulton County had no authority to enact the 1982 MBE Program, by awarding the airport project contract to Dickerson, Inc., instead of Groves, the lowest responsible

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[16] Fulton County is the only county that meets the size specifications of the new statute.

bidder, the County violated the state low-bid statute. The County may escape liability if it has a defense to its violation of state law. Fulton County offers three defenses: preemption, reliance on presumptively valid federal regulations, and constitutional estoppel.

a. *Preemption*

The County's first defense to its violation of the Georgia low-bid statute is that the DOT regulations, upon which the 1982 MBE Program was based, preempt the state statute. Of course, when Congress acts pursuant to its delegated powers, conflicting state law must yield. *See generally* J. Nowak, R. Rotunda, J. Young, *Constitutional Law* (3d ed. 1986) § 9.1. Further, regulations promulgated pursuant to a congressional delegation of authority can also preempt state law. *See Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982).

However, only measures that are *constitutional* may preempt state law. The Supremacy Clause, from which the preemption doctrine derives, *see id.* at 152, 102 S.Ct. at 3022, provides that: "This Constitution, and the Laws of the United States *which shall be made in pursuance thereof* ... shall be the supreme Law of the Land ..." U.S. Const. art. VI, cl. 2 (emphasis added). Chief Justice Marshall stated that "[t]he appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, *made in pursuance of the Constitution* ..." *Gibbons v. Ogden*, 22 U.S. (4 Wheat.) 1, 211, 6 L.Ed. 23 (1824) (emphasis added). *See also Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203, 103

S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983) ("It is well established that *within constitutional limits* Congress may preempt state authority ...") (emphasis added); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 *reh'g denied*, 431 U.S. 925, 97 S.Ct. 2201, 53 L.Ed.2d 240 (1977) (same); *Rollins Environmental Services (FS), Inc. v. Parish of St. James*, 775 F.2d 627, 634 (5th Cir.1985) (same). To hold that Congress could preempt state laws by enacting unconstitutional acts would be directly contrary to deeply rooted principles of Federalism.[17] Consequently, we conclude that Fulton County's preemption defense is only available if the DOT regulations are constitutional.

1. *The Constitutionality of the DOT Regulations*

As an initial matter, we must dispose of two questions of authority: Congress's authority to enact the program embodied in the DOT regulations and the DOT's authority to create such a program. These initial inquiries are mandated both by Supreme Court precedent, *see Fullilove v. Klutznick*; 448 U.S. 448, 476-77, 100 S.Ct. 2758, 2773-74, 65 L.Ed.2d 902 (1980), and by precedent in this circuit, *see South Florida Chapter of the Associated Gen. Contractors of America, Inc. v. Metropolitan Dade County*, 723 F.2d 846, 852 (11th Cir.), *reh'g denied*, 729 F.2d 1468, *cert. denied*, 469 U.S. 871, 105 S.Ct. 220, 83 L.Ed.2d 150 (1984).

The first question is answered by *Fullilove*. There, the Supreme Court decided that Congress had "employed an amalgam of its specifically delegated powers" in enacting an MBE program similar to the MBE program contained in

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[17] We do not agree that, "like Tinker Bell, [federalism] must be close to expiring because no one believes in it anymore." The Third Death of Federalism, 3 Const'l Commentary 293, 294 (D. Bryden & Farber, eds.).

the DOT regulations. *Fullilove*, 448 U.S. at 473, 100 S.Ct. at 2772. The answer to the second question is unfortunately not as clear.

Federal regulations have no less preemptive effect than federal statutes. *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982). However, regulations must not be "unreasonable, unauthorized, or inconsistent with" the statute that authorizes them. *Free v. Bland*, 369 U.S. 663, 668, 82 S.Ct. 1089, 1093, 8 L.Ed.2d 180 (1962). "What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued." *Chrysler Corp. v. Brown*, 441 U.S. 281, 308, 99 S.Ct. 1705, 1721, 60 L.Ed.2d 208 (1979).

The DOT identifies eight sources of authority for the regulations:

> (1) Section 905 of the Railroad Revitalization and Regulatory Reform Act of 1976;
>
> (2) Title VI of the Civil Rights Act of 1964;
>
> (3) Section 30 of the Airport and Airway Development Act of 1970;
>
> (4) The Urban Mass Transportation Act of 1964;
>
> (5) The Federal Property and Administrative Services Act of 1949;
>
> (6) Title 23 of the U.S. Code (relating to federal highways and highway safety);
>
> (7) Executive Order 11625;
>
> (8) Executive Order 12138.

49 C.F.R. § 23.1(b).

Whether some of these sources of "authority" could be construed to allow the DOT to enact an affirmative action program is questionable, at the very least. However, we need address only the Airport and Airway Development Act of 1970 (AADA) because we conclude section 30 of the Act authorizes the DOT to enact its MBE program. That section provides:

> The Secretary *shall take affirmative action* to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this chapter. The Secretary shall promulgate such rules *as the Secretary deems necessary to carry out the purposes of this section* and may enforce this section, and any rules promulgated under this section, through agency and department provisions and rules which shall be similar to those established and in effect under Title VI of the Civil Rights Act of 1964.

49 U.S.C.App. § 2219 (emphasis added).

For two reasons we believe the quoted passage may be fairly interpreted as a congressional delegation of the power to enact a program such as the MBE Program at issue here. First, the actual language of the statute indicates a broad delegation of power to the DOT to create regulations necessary to ensure there is no discrimination by recipients of federal funds under the AADA. Second, the statute endorses rules similar to those established under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and those

rules condone, and in some cases require, race-conscious regulations and/or action. *See* 49 C.F.R. § 21.5(b)(7).

Having decided that the DOT acted within the bounds of properly delegated congressional authority in creating the MBE regulations, we next must determine the proper standard by which to evaluate the constitutional validity of the DOT regulations. The district court relied on the plurality opinions in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260, *reh'g denied*, 478 U.S. 1014, 106 S.Ct. 3320, 92 L.Ed.2d 728 (1986), and *U.S. v. Paradise*, 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987), to conclude that the strict scrutiny standard "applies to racial classifications that operate against non-minorities." *S.J. Groves & Sons Co.*, 696 F.Supp. at 1485 and n. 8. Our assessment of relevant case law tells us that the resolution of the proper standard to be applied to the DOT regulations is difficult. After wading through the morass of often conflicting majority, plurality and dissenting opinions that deal with race-conscious affirmative action programs issued by the members of the Supreme Court, we conclude that the district court, quite understandably, applied the incorrect standard.

In *Fullilove*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), the Supreme Court reviewed the constitutionality of an MBE program contained in section 193(f)(2) of the Public Works Employment Act of 1977. The principal opinion in *Fullilove*, written by Chief Justice Burger, *id.* at 472, 100 S.Ct. at 2771, although stating that the program must be subject to "close examination," did not explicitly set out the appli-

cable standard.[18] Instead, in upholding the constitutionality of the program the opinion noted the unique remedial authority of Congress under section five of the Fourteenth Amendment and the deference to which Congress is entitled when it acts pursuant to that provision, *id.* at 472 & 483, 100 S.Ct. at 2771 & 2777, the abundant evidence available to Congress of past discrimination in the construction industry, *id.* at 458-67, 100 S.Ct. at 2764-69, and the provision for waivers of the MBE requirements where no MBEs were available or where an MBE sought to unfairly take advantage of its position by charging exorbitant prices. *Id.* at 487-88, 100 S.Ct. at 2779-80.

A plurality of the Court in *Wygant* employed strict scrutiny in analyzing the constitutionality of a local school board's policy of extending preferential protection against lay-offs to minority employees. *Wygant*, 476 U.S. at 273-74, 106 S.Ct. at 1846-47. In *Local 28 of Sheet Metal Workers' International Association v. EEOC*, 478 U.S. 421, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986), the constitutionality of a court-ordered affirmative action program was at issue. A plurality of the Court noted that "[w]e have not agreed ... on the proper test to be applied in analyzing the constitutionality of race-conscious remedial measures ... We need not resolve the

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[18] In analyzing fragmented Supreme Court opinions where no single decisional rationale has gained approval of the majority of the Court, lower federal courts should view the Court's holding "'as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977) (*quoting Gregg v. Georgia*, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 2923 n. 15, 49 L.Ed.2d 859 (1976)). Following this rule, the opinion written by Chief Justice Burger is the principal opinion in *Fullilove*.

dispute here, since we conclude that the relief ordered in this case passes even the most rigorous test..." *Local 28*, 478 U.S. at 480, 106 S.Ct. at 3052. A plurality of the Court came to the same conclusion in *Paradise*, where the constitutionality of a court-ordered promotion scheme was at issue. "[A]lthough this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis.[] We need not do so in this case, however, because we conclude that the relief ordered survives even strict scrutiny analysis..." *Paradise*, 480 U.S. at 167, 107 S.Ct. at 1064. In short, at least until 1989, no five members of the Supreme Court had agreed (at least in the same case) upon the proper standard for reviewing affirmative action programs.[19]

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[19] The variety of standards put forth by the various members of the Court is somewhat astonishing. *See, e.g., Paradise*, 480 U.S. at 187 n. 2, 107 S.Ct. at 1075 n. 2 (Powell, J., concurring) ("all government imposed affirmative action plans must be closely scrutinized"); *id.* at 197, 107 S.Ct. at 1080 (O'Connor, J., dissenting) (rejecting version of strict scrutiny applied by plurality because it "adopts a standardless view of 'narrowly tailored' far less stringent than that required by strict scrutiny."); *Wygant*, 476 U.S. at 274, 106 S.Ct. at 1847 (Powell, J., plurality opinion) (means chosen must be narrowly tailored to achieve a compelling governmental interest); *id.* at 284, 106 S.Ct. at 1852 (O'Connor, J., concurring) (same); *id.* at 301-02, 106 S.Ct. at 1861 (Marshall, J., dissenting) (remedial use of racial measures is permissible if it serves " 'important governmental objectives' " and is "'substantially related to achievement of those objectives'" (*quoting University of California Regents v. Bakke*, 438 U.S. 265, 359, 98 S.Ct. 2733, 2783, 57 L.Ed.2d 750 (1978)); *id.* at 313, 106 S.Ct. at 1867 (Stevens, J., dissenting) (both public interest served by racial classification and means employed must justify adverse effects on the disadvantaged group); *Fullilove*, 448 U.S. at 507, 100 S.Ct. at 2789 (Powell, J., concurring) (review should not be strict in theory and fatal in fact); *id.* at 491, 100 S.Ct. at 2781 (Burger, J.,

In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), a majority of the Court seemed to settle on a strict scrutiny standard for all government measures containing racial classifications. In *Croson*, the court held an MBE program developed by Richmond unconstitutional. *Croson*, 488 U.S. at 505, 109 S.Ct. at 727. Justice Scalia noted his agreement with the Court's conclusion that "strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign.' " *Id.* at 520, 109 S.Ct. at 735 (Scalia, J., concurring). Several commentators agreed that a single standard had finally been settled on.[20]

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principal opinion) ("Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees"); *id.* at 537, 100 S.Ct. at 2805 (Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"); *Bakke*, 438 U.S. at 291, 98 S.Ct. at 2748 (1978) (Powell, J., joined by White, J.) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination").

[20] *See, e.g.*, Freeman, *Antidiscrimination Law: The View from 1989*, 64 Tul.L.Rev. 1407, 1432 (1990) ("remedial racial classifications are henceforth to be treated as 'suspect' and subjected to the same 'strict scrutiny' applied in racial discrimination cases."); Fried, *Affirmative Action After City* of Richmond v. J.A. Croson Co.: *A Response to the Scholars' Statement*, 99 Yale L.J. 155, 156 (1989) ("For the first time a majority of the Court holds unequivocally that racial classifications ... must pass strict scrutiny and be justified by a compelling governmental purpose"); Rosenfeld, *Decoding* Richmond: *Affirmative Action and the Meaning of Constitutional Equality*, 87 Mich.L.Rev. 1729, 1731 (1989) ("a majority on the Court for the first time has settled on a single standard-the strict scrutiny test"); Sullivan, City of Richmond v. J.A. Croson Co.: *The Backlash Against Affirmative Action*, 64 Tul.L.Rev. 1609, 1611 (1990) ("the Court

If *Croson* were the Supreme Court's latest word on this question, we would probably agree that the district court, in applying the strict scrutiny standard to the DOT regulations, had proceeded correctly. However, *Croson* is not the Court's most recent treatment of affirmative action. On the final day of the Court's last Term, *Metro Broadcasting, Inc. v. FCC*, ___ U.S.___, 110 S.Ct. 2997, 111 L.Ed.2d 445 *reh'g denied*, ___ U.S. ___, 111 S.Ct. 15, 111 L.Ed.2d 829, was decided. Although the issue is hardly free of doubt, our reading of *Metro Broadcasting* leads us to conclude that the Supreme Court would utilize an intermediate level of scrutiny in evaluating the DOT regulations. With the benefit of the opinion in *Metro Broadcasting*, which of course was decided after the district court issued its orders in this case, we conclude that the district court erred in subjecting the regulations to the most stringent strict scrutiny standard.

In *Metro Broadcasting*, the Court considered the question "whether certain minority preference policies of the Federal Communications Commission violate the equal protection component of the Fifth Amendment." *Id.* at ___, 110 S.Ct. at 3002. One of the challenged policies awards an enhancement for minority ownership and participation in management in evaluating applications for new broadcast licenses. *Id.* at ___, 110 S.Ct. at 3004-05. The second challenged policy allows distress sales to be resolved with a noncompetitive hearing, if the buyer is a minority enterprise. *Id.* at ___, 110 S.Ct. at 3005. The Court upheld both policies, applying intermediate scrutiny in doing so. *Id.* at

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invalidated the Richmond plan under a standard of strict scrutiny upon which a majority coalesced."); *see also* Washington, *Minor Set-Aside Programs After* City of Richmond v. J.A. Croson Co., 19 Stetson L.Rev. 833, 841-42 (1990).

___, 110 S.Ct. at 3002. The Court held "that benign race-conscious measures mandated by Congress[]–even if those measures are not 'remedial' in the sense of being designed to compensate victims of past government or societal discrimination-are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." *Id.* at ___, 110 S.Ct. at 3008-09.

The majority opinion[21] made it clear that *Croson* "does not prescribe the level of scrutiny to be applied to a benign racial classification employed by Congress." *Id.* at ___, 110 S.Ct. at 3009. The opinion instead relied on *Fullilove,* asserting that a "majority of the court in *Fullilove* did not apply strict scrutiny to the race-based classification at issue." *Id.* at ___, 110 S.Ct. at 3008. A clear demarcation between affirmative action programs developed by state and local governments and those developed at the direction of Congress was drawn. "It is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved-indeed mandated-by Congress." *Id.*

Therefore, it seems to us that the Court has created a dual inquiry for evaluating affirmative action programs. First, we must determine whether a state or local government has developed the program, or whether Congress has authorized the program's creation. If the former, a court must strictly scrutinize the program. That is, the means cho-

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[21] Justice Brennan wrote the majority opinion; he was joined by Justices White, Marshall, Blackmun and Stevens. Justice Stevens also filed a concurring opinion, but specifically joined both the opinion and judgment of the Court. *See Metro Broadcasting,* ___ U.S. at ___, 110 S.Ct at 3028 (Stevens, J., concurring).

sen must be narrowly tailored to achieve a compelling governmental interest. If the latter, however, then an intermediate level of scrutiny is appropriate. The program must serve an important governmental interest and the means must be substantially related to the achievement of that objective. Because Congress authorized the creation of the MBE program contained in the DOT regulations, the district court should have applied an intermediate level of scrutiny in evaluating the regulations. We will therefore remand the case for reconsideration in light of the appropriate standard. In the interest of judicial economy, however, we will address the County's other defenses.

b. *Reliance*

Fulton County's next defense is that it should not be held liable for violating the Equal Protection Clause when, in creating the 1982 MBE Program, it was only relying on presumptively valid federal regulations. The short answer to this defense is that the County is *not* being held liable for the violation of any federal right. Rather, its potential liability is based on violation of the Georgia low-bid statute. The question remains, however, whether Fulton County's reliance on what it believed were constitutional federal regulations is a defense in this suit.

We note initially that we have trouble allowing a local government to plead reliance on federal regulations when the local government *voluntarily* relied on those regulations. Fulton County argues as though the federal government forced it to apply for a grant under the AADA. Obviously, the County could have chosen other means to raise the funds to repair the Brown Field runway. On the other hand, the County argues that as far as it was aware, the AADA

grant program and the accompanying DOT regulations that the County was required to comply with in order to qualify for the grant, were valid exercises of federal authority. Presumably then, the County's argument is actually that it has a right to rely on federal regulations (at least until they are declared invalid) to preempt conflicting state law.

The County's defense is foreclosed by the recent Supreme Court decision in *American Trucking Ass'ns v. Smith*, ___ U.S. ___, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990). In that case, five justices rejected the notion that "the constitutionality *vel non* of [a statute or regulation] turns on whether state officials in a particular state could have anticipated that such a [statute or regulation] would violate the Constitution ...." *Id.* at ___, 110 S.Ct. at 2345 (Stevens, J., dissenting).[22] As Justice Scalia explained,

> To hold a governmental act to be unconstitutional is not to announce that *we* forbid it, but that the *Constitution* forbids it; and when, as in this case, the constitutionality of a state statute is placed in issue, the question is not whether some decision of ours "applies" in the way that a law applies; the question is whether the Constitution, as interpreted in that decision, invalidates the statute. Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense.

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[22] The four dissenters and Justice Scalia (concurring in the judgment) took this position.

Id. at ___, 110 S.Ct. at 2343 (Scalia, J., concurring in judgment) (emphasis in original).

Therefore, the DOT regulations if they indeed are unconstitutional, were unconstitutional when Fulton County relied on them. We are without power to declare them constitutional "in the interim," as the County urges. There is simply no authority on which to do so.

Additionally, we would have difficulty simply declaring the regulations unconstitutional, and then not applying that declaration even to the parties before the court. Such a decision would approach an advisory opinion, in violation of the Article III case or controversy requirement.[23]

c. *Constitutional Estoppel*

Fulton County's final defense[24] is that Groves is estopped from attacking the constitutionality of the DOT regulations. Under the doctrine of constitutional estoppel, one may not "retain the benefits of [statute or regulation] while attacking the constitutionality of one of its provisions." *U.S. v. San Francisco*, 310 U.S. 16, 29, 60 S.Ct. 749, 756, 84 L.Ed. 1050 *reh'g denied*, 310 U.S. 657, 60 S.Ct. 1071, 84 L.Ed. 1420 (1940). The district court rejected this defense because Groves has received no benefits under the AADA, because it found *Fahey v. Mallonee*, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947), relied upon the County,

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[23] *See* U.S. Const., art. III, § 2.

[24] Fulton County also requests that we create a qualified immunity against liability for violation of state law when a local government relies on federal regulations that have not yet been declared unconstitutional. The County cites authority for the creation of this new form of qualified immunity, and we decline to create it out of thin air.

distinguishable and because the DOT regulations do not and are not designed to benefit non-MBE firms.

We agree with the district court. First it is clear that the DOT regulations were not intended to benefit non-MBE firms; precisely the opposite is true-such firms are burdened by the regulations. Second, even if the regulations were intended to benefit Groves and similar bidders, there has been no showing that Groves ever received any contract under the AADA that was subject to the DOT regulations. The district court's order was limited to declaring subpart C of the regulations unconstitutional; it did *not* apply to subpart D which relates to highway development. Consequently, any contracts bid on or performed that were subject to subpart D of the regulations are irrelevant to this case.

Fahey is not analogous. That case involved a shareholders' derivative suit in which a savings and loan association created under an act of Congress sought to challenge the constitutionality of that same act. The Supreme Court refused to hear the suit. "It would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act to *gain advantages of corporate existence* is estopped from questioning the validity of its vital conditions." *Fahey*, 332 U.S. at 256, 67 S.Ct. at 1557 (emphasis added). As the Supreme Court noted in response to an invocation of the doctrine of constitutional estoppel similar to the one we deal with here, "[a]ppellants obviously are not creatures of any statute, and we doubt that plaintiffs are generally forbidden to challenge a statute simply because they are deriving some benefit from it." *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 456-57, 108 S.Ct. 2481, 2486, 101 L.Ed.2d 399 (1988).

We conclude, therefore, that the district court correctly found that the reliance and constitutional estoppel defenses offered by Fulton County are not viable defenses in this case. As noted, however, we will remand the County's preemption argument to the district court for reevaluation.

IV. CONCLUSION

We VACATE the district court's order and judgment granting relief on Counts VI through VIII and REMAND with instructions to dismiss the claims asserted in those counts for lack of standing. We VACATE the district court's judgment in favor of Groves on the remaining claims and REMAND for reconsideration of the County's preemption defense consistent with this opinion.

Appendix B

S.J. GROVES & SONS COMPANY and Jasper Construction Co., Plaintiffs,

v.

FULTON COUNTY, et al., Defendants.
Civ. A. No. C82-1895A.

United States District Court,
N.D. Georgia,
Atlanta Division.

March 30, 1987.

ORDER

FORRESTER, District Judge.

I. INTRODUCTION.

A. *Background.*

This action challenging the constitutionality of the Federal Department of Transportation's Minority Business Enterprise (MBE) rule is before the court on cross motions by the plaintiffs and the federal defendants for summary judgment on counts IX and X of the plaintiffs' fifth amended complaint. The federal defendants are the United States Department of Transportation and Elizabeth H. Dole, the Secretary of the United States Department of Transportation (hereinafter referred to jointly as "DOT"). The plaintiffs are S.J. Groves & Sons Company and Jasper Construction Company, Minnesota corporations with their principal place of business in Minneapolis, Minnesota. Jasper Construction Company is a wholly owned subsidiary of S.J. Groves & Sons Company.

According to the plaintiffs' complaint, defendant Fulton County issued an invitation to bid for the construction of base, pavement, and related work at Fulton County Airport-Brown Field in Atlanta. The invitation advised bidders of Fulton County's goals for MBE participation and promised the contract to the lowest responsible bidder who met the MBE goals or made good faith efforts to do so. The plaintiffs' timely bid, submitted in May of 1982, was the lowest bid received. The plaintiffs contend that they made a good faith effort to meet the MBE goals but failed. Fulton County awarded the contract to another bidder whose assurance of MBE participation percentage was greater than the plaintiffs'.

The plaintiffs sued Fulton County for breach of contract, arguing in Counts I through V that the county's rejection of the plaintiffs' bid violated Georgia's low-bid statute, O.C.G.A. § 36-10-2, and that the MBE program violated the Georgia Constitution (Art. I, Sec. 1, Par. 2), Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), and the equal protection clause of the fourteenth amendment. Counts VI through VIII of the complaint challenge a June 6, 1984 resolution of the Fulton County Board of Commissioners that reenacted an MBE affirmative action program. The resolution was challenged under the state low-bid statute, the equal protection clause of the fourteenth amendment, and Title VI.[1]

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[1] Jasper Construction Company is a plaintiff in counts six through eight because of its present involvement in construction work in Atlanta and the alleged detriment caused to it by the county's MBE resolution.

In an order filed September 30, 1985 this court granted summary judgment to the plaintiffs on counts VI through VIII concerning the 1984 resolution. The court denied the plaintiffs' motion for summary judgment on count I because the plaintiffs' good faith effort to meet the MBE goals was disputed. In addition, the defendant Fulton County claimed federal preemption of Georgia's low bid statute, O.C.G.A. § 36-10-2, by the United States Department of Transportation regulation, if valid. The court agreed with Fulton County that the state statute would be preempted if the regulation were valid and deferred the motions as to counts II through V pending joinder of the federal defendants and resolution of the regulation's validity. The plaintiffs' Fifth Amended Complaint added counts IX and X, alleging that the federal defendants' promulgation of the MBE regulation violated, *inter alia*, the equal protection component of the fifth amendment.

B. *Framework for Analysis.*

As the court noted in its September 30, 1985 order, "the validity under federal law of a voluntarily-enacted affirmative action plan which permits race-conscious relief turns on application of the standards set out in *South Florida Chapter of the Associated General Contractors of America v. Metropolitan Dade County, Florida*, 723 F.2d 846, 851 (11th Cir.1984) [*reh'g denied*, 729 F.2d 1468, *cert. denied*, 469 U.S. 871, 105 S.Ct. 220, 83 L.Ed.2d 150 (1984)]." Order, at 31. In *South Florida Chapter*, the Eleventh Circuit set out a three-step analysis for affirmative action plans enacted by governmental bodies. Under that analysis, the court must ensure:

> (1) that the governmental body have the authority to pass such legislation; (2) that adequate findings have been made to ensure that the governmental body is *remedying* the present effects of past discrimination rather than advancing one racial or ethnic group's interests over another; and (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination.

723 F.2d at 851-52 (original emphasis). The last two steps parallel the two-pronged examination utilized by a plurality of the Supreme Court in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 1846, 90 L.Ed.2d 260 (1986):

> First, any racial classification "must be justified by a compelling governmental interest." Second, the means chosen by the State to effectuate its purpose must be "narrowly tailored to the achievement of that goal."

Accordingly, the court will outline the regulation at issue here and will then proceed to analyze its validity according to the *South Florida Chapter* framework.

C. *DOT's MBE Regulation.*

DOT's regulation entitled "Participation by Minority Business Enterprise in Department of Transportation Programs" is found at 49 C.F.R. § 23.01 *et seq.*[2] The regulation defines minority as follows:

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[2] On May 17, 1979 DOT issued a Notice of Proposed Rule Making (NPRM) for the MBE regulation. 44 Fed.Reg. 28928. A final rule was is-

"Minority" means a person who is a citizen or lawful permanent resident of the United States and who is:

(a) Black (a person having origins in any of the black racial groups of Africa);

(b) Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race);

(c) Portuguese (a person of Portuguese, Brazilian, or other Portuguese culture or origin, regardless of race);

(d) Asian American (a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands); or

(e) American Indian and Alaskan Native (a person having origins in any of the original peoples of North America.)

(f) Members of other groups, or other individuals, found to be economically and socially disadvantaged by the Small Business Administration under

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sued March 31, 1980. 45 Fed.Reg. 21172. On March 3, 1981 DOT issued an NPRM to amend one provision of the MBE regulation. 46 Fed.Reg. 16282. The regulation was promulgated in its present form as a final rule on April 27, 1981. 46 Fed.Reg. 23457.

> section 8(a) of the Small Business Act, as amended (15 U.S.C. § 637(a)).

49 C.F.R. § 23.5. "Minority business enterprise" or "MBE" is defined as "a small business concern ... which is owned and controlled by one or more minorities or women." *Id.*

The MBE regulation requires recipients of DOT funds (state and local governments) to implement an MBE program incorporating certain specific features. The regulation does not set a uniform percentage goal but leaves it to the recipients to do so. Among the required components of MBE programs are the following:

> (a) A policy statement expressing a commitment to use MBEs in all aspects of contracting to the maximum extent feasible;
>
> (b) The designation of an MBE liaison officer;
>
> (c) Affirmative action techniques to facilitate MBE participation in contracting, including the following:
>
> > (1) arranging solicitations, time for the presentation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation of MBEs;
> >
> > (2) providing assistance to MBEs in overcoming barriers such as the inability to obtain bonding, financing, or technical assistance; and
> >
> > (3) carrying out information and communications programs on contracting procedures and specific con-

tracting opportunities in a timely manner, with such programs being bilingual where appropriate.

(d) Encouraging the use of banks owned or controlled by minorities or women;

(e) Making an MBE directory available to bidders;

(f) Certification of the eligibility of MBEs by the recipient, to ensure that the MBE program benefits only firms owned and controlled by minorities;

(g) Establishing percentage goals for the dollar value of work to be awarded to MBEs, including overall goals and goals on each specific prime contract with subcontracting possibilities; overall goals are to be based on a projection of the number and types of MBEs likely to be available to compete for contracts; goals for specific contracts are to be based on the known availability of qualified MBEs; and

(h) A requirement that bidders who do not meet the MBE contract goals satisfy the recipient that the bidder has made "good faith efforts" to meet the goals.[3]

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[3] The regulation does not define what constitutes "good faith efforts," but instead leaves the determination to the recipient. In Appendix A to subpart C of the regulation DOT provides a list meant to suggest the kinds of efforts recipients might consider. A determination of whether the instant plaintiffs' actions constituted good faith efforts is not neces-

See 49 C.F.R. § 23.45.

Finally, the regulation includes a provision allowing exemptions from the above-listed requirements if "the particular situation is exceptional" and if "the modified program complies substantially" with the regulations. *Id.* § 23.41(f).

II. WHETHER THE REGULATION WAS AN EXERCISE OF VALIDLY DELEGATED AUTHORITY.

Substantive agency regulations have the "force and effect of law," and therefore preempt state statutes, only when they are "rooted in a grant of [legislative] power by the Congress and subject to limitations which that body imposes." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, 99 S.Ct. 1705, 1718, 60 L.Ed.2d 208 (1979). "[I]t is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress." *Id.* at 304, 99 S.Ct. at 1719. "What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued." *Id.* at 308, 99 S.Ct. at 1721.[4]

In the preface to the regulation, 49 C.F.R. part 23, the Secretary of Transportation identifies eight sources of authority for the regulation:

> Sec. 905 of the Railroad Revitalization and Regulatory Reform Act of 1978 (45 U.S.C. 803);

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sary to the resolution of the present motions, since the complaint presents a facial challenge to the regulation.

[4] The Court concluded in *Chrysler Corp.* that the statutes relied on by the Secretary of Defense did not authorize the regulations at issue there. 441 U.S. at 303-12, 99 S.Ct. at 1718-23.

> Sec. 30 of the Airport and Airway Development Act of 1970, as amended (49 U.S.C. 1730); Sec. 19 of the Urban Mass Transportation Act 1964, as amended (Pub.L. 95-599); Title 23 of the U.S.Code (relating to highways and highway safety); Title 6 of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*); the Federal Property and Administrative Services Act of 1949 (49 U.S.C. 471 *et seq.*); Executive Order 11625; Executive Order 12138, unless otherwise noted.

One district court has held that none of the eight statutes or Executive Orders cited constitutes a delegation of congressional authority to DOT. *Central Alabama Paving, Inc. v. James*, 499 F.Supp. 629 (M.D. Ala.1980). Another district court rejected all but the Executive Order as the source of the agency's authority. *M.C. West Inc. v. Lewis*, 522 F.Supp. 338 (M.D. Tenn.1981).[5] The present case is unlike *Central Alabama Paving* and *M.C. West*, however, in that the construction project being funded by

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[5] Though this court's resolution of the source of authority issue, *infra*, makes extended discussion of Executive Order 11625 unnecessary, the court notes that there are serious problems with relying on the Executive Order as the requisite source of authority. First, the Executive Order does not authorize any efforts not then in effect. The Executive Order, which is directed primarily to the Secretary of Commerce, merely directs that "[e]ach Federal department or agency shall, within constraints of law . . . , continue all *current* efforts to foster and promote minority business enterprises." Section 3(e) (emphasis supplied). It is undisputed that DOT had no race-conscious MBE programs in effect at the time the Executive Order was issued. Second, the Executive Order could not authorize any efforts, even if then in effect, that were without congressional authorization. The Executive Order must itself be

DOT is an airport rather than a highway. The most obvious possible source of authority for the MBE regulation, at least as applied to airport programs, is the Airport and Airway Improvement Act of 1982, 49 U.S.C.App. §§ 2201 *et seq.*, originally known as the Airport and Airway Development Act (AADA) of 1970. Section 30 of the AADA, now 49 U.S.C.App. § 2219, provides:

> The Secretary shall take affirmative action to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this chapter. The Secretary shall promulgate such rules *as the Secretary deems necessary to carry out the purpose of this section* and may enforce this section, and any rules promulgated under this section, through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964.

(Emphasis supplied).

The language emphasized above is much broader than the statutory language found wanting in *Central Alabama Paving* and *M.C. West*. For example, the court in *Central Alabama Paving* analyzed the language of section 905 of the Railroad Revitalization and Regulatory Reform Act (RRA) of 1976, 45 U.S.C. § 803. The court concluded that the RRA was not a "conscious conferral of authority" by Congress because "nothing in the Railroad Revitaliza-

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congressionally authorized. *See Chrysler Corp.*, 441 U.S. at 304, 99 S.Ct. at 1718.

tion Act confers on DOT the authority to further the statute's general anti-discrimination provisions by whatever means it deems efficacious." 499 F.Supp. at 638. Here, the AADA does grant such broad authority to effectuate the Act's purposes, and those purposes explicitly include preventing race discrimination. The language of the AADA is also quite different from the "thou-shalt-not discriminate laws" discussed, and rejected as statutory bases for DOT's MBE regulation, in *M.C. West*, 522 F.Supp. at 345.

There is a further difference between the AADA and statutes that fail to provide a nexus between the MBE regulation and a delegation of congressional authority. The AADA authorizes "rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964." 49 U.S.C. § 2219. The Title VI regulations, which were in force in their present form at the time § 30 of the AADA was adopted in 1976 and are now found at 49 C.F.R. § 21.1 *et seq.*, explicitly condone race conscious remedies:

> This part does not prohibit the *consideration of race*, color, or national origin if the purpose and effect are *to remove* or overcome *the consequences of practices or impediments which have restricted* the availability of, or participation in, the program or activity receiving Federal financial assistance, on the grounds of race, color, or national origin. *Where prior discriminatory practice* or usage tends, on the grounds of race, color, or national origin, *to exclude individuals from participation in*, to deny them the benefits of, or to subject them to discrimination

> under any program or activity to which this part applies, *the applicant or recipient must take affirmative action to remove or overcome the effects of the prior discriminatory practice or usage.*

49 C.F.R. § 21.5(b)(7) (emphasis added).

Given the broad language of the civil rights section of the AADA, the difference between the language of the AADA and that of other statutes that fail to satisfy the *Chrysler Corp.* standard, and the statute's approval of regulations incorporating race consciousness, the court concludes that DOT's MBE regulation is rooted in a grant of congressional authority and therefore does have "the force and effect" of law[6] to the extent that the regulation is constitutional. A fair reading of this section would indicate congressional delegation of the power to require racial classification, preference or set aside by a recipient of federal funds if found necessary to remove or overcome the effects of past discrimination. The remaining questions include whether the discrimination must have been that of the DOT or of the recipient and whether the "effect" is only difficulty or barriers confronted by extant

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[6] The AADA's grant of authority satisfies the *Chrysler Corp.* standard, i.e., this court reasonably is able to conclude that the AADA *contemplates* DOT's MBE regulation, but it is still true that the statute does not specifically authorize race-conscious remedies such as MBE goals. DOT's adoption of such a remedy should therefore be more carefully scrutinized for constitutional validity than a regulation pursuant to an express congressional directive to adopt such a remedy. *See* Note, Principles of Competence: The Ability of Public Institutions to Adopt Remedial Affirmative Action Plans, 53 U.Chi.L. Rev. 581, 600 (1986) (hereinafter referred to as "Note").

MBEs or by the small population of MBEs caused by past *societal* discrimination.

III. WHETHER THE REGULATION IS CONSISTENT WITH THE FIFTH AMENDMENT.

The Supreme Court recently addressed the constitutionality of race conscious remedies in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986).[7] The plurality opinion in *Wygant*, written by Justice Powell and joined by three other justices, made it clear that "strict scrutiny" applies to racial classifications that operate against non-minorities. *Id.* at 1846.[8] The plurality opinion also set out the proper framework for analysis of such cases:

> "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." There are two prongs to this examination. First, any racial classification "must be justified by a compelling governmental interest." Second, the means chosen by the State to effectuate its purpose

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[7] The court held in *Wygant* that a school board's policy of extending preferential protection against lay-offs to minority employees violated the equal protection clause of the fourteenth amendment.

[8] For recognition that a majority of the Supreme Court now seeks to review race-conscious affirmative action plans under a standard of strict scrutiny, *see* Note, 53 U.Chi.L.Rev. at 581 n. 1, 622 Note 174. *See also United States v. Paradise*, 480 U.S. 149, 164-70, 107 S.Ct. 1053, 1063-66, 94 L.Ed.2d 203 (1987), where a different plurality applied strict scrutiny without deciding whether that analysis is always appropriate to affirmative action programs.

> must be "narrowly tailored to the achievement of that goal."

Id. (citations omitted).

DOT contends that the two-pronged "searching examination" is unnecessary in this case because the MBE regulation is not a preference based on racial or ethnic criteria. According to DOT,

> The regulation, as amended, does not mandate prime contractors to award contracts or subcontracts on the basis of race or gender. Rather, it requires that such contractors engage in good faith efforts to recruit and consider for subcontracting possibilities those MBEs who are qualified and available to compete. Its function is to provide assurance that contractors do not discriminate against MBEs, not to require discrimination in their favor.

Federal Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Federal Defendants' Cross Motion for Summary Judgment, at 8 (footnote omitted). It concedes, however, that the regulation requires a recipient to establish an overall goal for the entire MBE program or for a specific grant or for an individual contract if it has subcontracting possibilities. *Id.* at 5.

DOT's argument is equivalent to the "goal" versus "quota" word game engaged in by the parties in *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). In his opinion holding unconstitutional the university's special admissions pro-

gram, Justice Powell rejected the version of DOT's argument presented in that case:

> This semantic distinction is beside the point: the special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admission seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.

Id. at 289, 98 S.Ct. at 2747 (footnote omitted).

Here, as in *Bakke*, if the program goals are met non-MBEs are effectively prevented from competing for all available subcontracts, although MBEs may. Further, the affirmative steps contemplated for contractors and recipients mean that MBEs compete on a much more favorable basis. *See* 49 C.F.R. Part 23, Subpart C, Appendix A ("Guidance Concerning Good Faith Efforts"). DOT's MBE program "involves a purposeful, acknowledged use of racial criteria," *id.* at 289 n. 27, 98 S.Ct. at 2747 n. 27, and is therefore a "classification based on race." Significantly, DOT's argument that its MBE program does not create a racial preference was flatly rejected in both previous challenges to the program. *See M.C West*, 522 F.Supp. at 343 ("the setting of goals and standards for compliance, be they compulsory or good faith standards, for the expenditure of federal funds to the benefit of a certain group of individuals is a preference"); *Central Alabama*

Paving, 499 F.Supp. at 636 ("[T]hese regulations . . . accord a preference to one group of citizens based on race").[9]

A. *Whether the Regulation was Justified by a Compelling Governmental Interest.*

A governmental body may have a compelling interest in remedying prior discrimination, and that interest may serve to justify its imposition of race conscious programs, *Wygant*, 106 S.Ct. at 1847 (plurality opinion), but only in certain circumstances. As Justice Powell wrote in *Wygant:*

> This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of *prior discrimination by the governmental unit involved* before allowing limited use of racial classifications in order to remedy such discrimination.... [T]he relevant analysis in cases involving proof of discrimination by statistical disparity focuses on those disparities that demonstrate such prior governmental discrimination.

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[9] DOT attempts to distinguish *Central Alabama Paving* as a decision concerned exclusively with the "conclusive presumption" provision of the regulation, which has since been amended and replaced by the "good faith efforts" requirement. But that characterization of *Central Alabama Paving* is simply wrong. The plaintiffs in that case challenged both the conclusive presumption provision *and* the regulation's requirement of an overall fixed percentage goal. 499 F.Supp. at 633. The court concluded that "these regulations," not one or the other provision of the regulations, "accord a preference to one group of citizens based on race." *Id* at 636.

Id. (emphasis supplied). Justice O'Connor, concurring, "agree[d] with the Court that a governmental agency's interest in remedying 'societal' discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny." *Id.* at 1854.[10]

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[10] Though the parties have not raised this issue, the court notes that some of the plurality's language in *Wygant* seems to describe the "findings" issue as a question of fact rather than of law. *See* 106 S.Ct. at 1848 ("The trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary"); *id.* at 1849 n. 5 ("The very nature of appellate review requires that a factfinder determine whether the [governmental body] was justified in implementing a remedial plan.... [T]he requirement of such a determination by the trial court is not some arbitrary barrier set up by today's opinion. Rather, it is a necessary result of the requirement that race-based state action be remedial"). If the question whether DOT has made adequate findings is a question of fact, it cannot be resolved in the context of the present summary judgment motions because the issue is certainly in dispute. However, the Supreme Court has never before treated the findings issue purely as a question of fact for the trial court. Instead, the court has itself made the necessary determination. *See Fullilove v. Klutznick*, 448 U.S. 448, 473, 100 S.Ct. 2758, 2772, 65 L.Ed.2d 902 (1980) (Opinion of Burger, C.J.); *id.* at 502-06, 100 S.Ct. at 2787-89 (Powell, J., concurring); *University of California Regents v. Bakke*, 438 U.S. 265, 307-10, 98 S.Ct. 2733, 2757-59, 57 L.Ed.2d 750 (1978) (Opinion of Powell, J.). The courts of appeals also treat the findings issue as a question of law that requires an appellate determination independent from the district court's conclusions. *See, e.g., J.A. Croson Company v. City of Richmond*, 779 F.2d 181, 188-90 (4th Cir.1985), *vacated on other grounds*, 478 U.S. 1016, 106 S.Ct. 3327, 92 L.Ed.2d 733 (1986). Finally, other district courts have resolved the findings issue, in similar cases, at the summary judgment stage. *See Associated General Contractors v. City and County of San Francisco*, 619 F.Supp. 334, 340 (N.D. Cal.1985);

The "showing of prior discrimination required by the plurality in *Wygant* need not be the equivalent of a judicial determination that such discrimination existed. Instead,

> [the governmental body] must insure that, before it embarks on an affirmative action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.

Id. at 1848. *See also id.* at 1855-56 (O'Connor, J., concurring) (requiring the government to "act on the basis of information which gives them a sufficient basis for concluding that remedial action is necessary"); *South Florida Chapter*, 723 F.2d at 852 (requiring "adequate findings to ensure that the county was acting to remedy the effects of past discrimination rather than advancing one group's interest over another based on a perceived need not founded in fact").

The "showing" or "findings" of prior discrimination relied on by DOT in its decision to formulate MBE regulations consist of the following:[11]

> (1) Comments received by DOT in response to the May 17, 1979 NPRM for the MBE regulation,

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Michigan Roadbuilders Association, Inc. v. Milliken, 571 F.Supp. 173, 177-87 (E.D. Mich.1983), *appeal dismissed*, 742 F.2d 1456 (6th Cir.1984). This court will follow the traditional characterization of the findings issue and will treat it as a question of law amenable to resolution at the summary judgment stage.

[11] Neither the authorizing stautes nor the regulations contain any findings of prior discrimination, and DOT does not contend otherwise.

the March 31, 1980 final rule, and the March 12, 1981 proposed amendment to section 23.45 of the MBE regulation;

(2) "Appendix II," a narrative description of the evidence supporting the regulation prepared as an appendix to a DOT brief filed in *M.C West v. Lewis*, 522 F.Supp. 338, and various agency and commission reports referenced in "Appendix II;"

(3) Data referenced in the preambles to the May 17, 1979 NPRM, the March 31, 1980 final rule, and the regulatory evaluations attached thereto.[12]

Very little of the material contained in the three listed sources even remotely resembles "findings" of prior discrimination by DOT or its recipients.[13] First, the

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[12] Most, if not all, of these documents in the three categories are contained in the plainfiffs, Composite Exhibits 29 and 30. The above description of the thousands of pages contained in Exhibits 29 and 30, and DOT's identification of the documents as its "findings" comes from DOT's February 25, 1986 letter to the plaintiffs, attached as Exhibit C to Plaintiffs' Motion for Summary Judgment on Counts IX and X, and from Plaintiffs' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment on Counts IX and X at ¶2.

[13] The correct focus is on prior discrimination by DOT or recipients of DOT funds because the AADA's authorization for affirmative action by DOT, if such authorization exists at all, extends only to "activit[ies] conducted with funds received" under the AADA. 49 U.S.C. § 2219. By no stretch of the imagination does the statute authorize DOT to attempt to remedy all discrimination or even all discrimination in the construction industry. *See* Note 53, U.Chi.L.Rev. at 604 note 103 (the distinction between societal discrimination and discrimination by the

comments received by DOT in response to its NPRM, final rule, and proposed amendment cannot serve as findings of prior discrimination. By definition the comments *followed* DOT's drafting and public proposal of the MBE regulation; the comments cannot serve as the basis of a regulation that had already been drafted. Nor were the comments the basis of any changes in the regulation relevant to the present case.[14] The most that could be argued is that the comments might serve to confirm DOT's suspicion that prior discrimination had existed. However, DOT has not made such an argument and has provided the court with no analysis or description of the content of the comments. It is reasonable to assume that a substantial percentage of the comments *opposed* the concept of MBE goals and that another substantial percentage was concerned primarily with details of the regulation, such as definitions and paper work requirements, and not the regulation's underlying justification. Absent any indication from DOT that any of the comments provided evidence of prior discrimination by DOT, this court cannot assume that such evidence is in there somewhere.[15]

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governmental body is "a consequence of the differences in authority commonly seen among government bodies").

[14] The one amendment promulgated by DOT substituted the present "good faith efforts" provision for the original "conclusive presumption" provision. The latter required that if any contractor offering a reasonable price met the recipient's MBE goal, the recipient was to presume conclusively that all other bidders were ineligible for failure to exert sufficient efforts to reach the MBE goal. *See Central Alabama Paving*, 499 F.Supp. at 632, citing 45 Fed.Reg. 21188.

[15] The court in *M.C West*, 522 F.Supp. at 347-48, reached the opposite conclusion without reciting any reason to believe that the comments received actually supported DOT's conclusion that the regulation was

Second, though some of the evidence presented in "Appendix II" is more probative than the comments discussed above, the evidence is far too weak to justify race conscious remedial measures.[16] In the nineteen-page document, the court could find only four pieces of information that had any tendency at all to support a conclusion that DOT or its recipients had previously discriminated in letting government contracts. The first is the statistic, attributed to Senator Brooke, 123 Cong.Rec. 7156 (1977), that less than one percent of federal contract dollars goes to MBEs. Appendix II, at 12. Even assuming the statistic is accurate, it is incomplete, overbroad, and outdated. It is incomplete because it does not give the corresponding ratio of MBE contractors to non-MBE contractors competing for federal dollars.[17] It is overbroad be-

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warranted by prior discrimination. Instead, the court justified its acceptance of the "Notice and Comment Adversary-Like Process" as sufficient "findings" primarily because the findings reviewed in *Fullilove*, 448 U.S. 448, 100 S.Ct. 2758, were unspecific. However, as the opinions in *Fullilove* made clear, DOT is required to compile a more specific record than is Congress. *See, e.g.*, 448 U.S. at 478, 100 S.Ct. at 2774 (Opinion of Burger, C.J.) and the discussion *infra* at 1489-90.

[16] The court assumes, and DOT has not indicated otherwise, that "Appendix II" synthesizes the strongest evidence of prior discrimination from the hundreds of pages of reports it references. Therefore, only the evidence actually discussed in Appendix II will be dealt with here.

[17] The school board in *Wygant* relied on similarly mis-matched statistics. *See* 106 S.Ct. at 1857 (O'Connor, J., concurring) (disparity between percentage of minorities on teaching staff and percentage of minorities in student body not probative of employment discrimination; relevant statistic is percentage of minorities available in relevant labor pool). *See also J. Edinger & Son, Inc. v. City of Louisville*, 802 F.2d 213 (6th Cir.1986) (city's reliance on general population statistics not sufficient

cause it is not limited to DOT contracts under the AADA or even to DOT contracts generally, but instead includes all federal contract dollars. It is outdated because statistics only two years later show that, for DOT contracts at least, MBEs were receiving 2.7 percent. *See* 45 Fed.Reg. 21172, 21174.

The other arguably probative pieces of evidence in Appendix II are drawn from a report of the U.S. Commission on Civil Rights entitled "Minorities and Women as Government Contractors" (May 1975). The report relates the following: (1) 44.8% of 125 owners (104 minority, 21 women) interviewed by the Commission "felt" that federal contracting officers imposed more stringent criteria on MBEs and WBEs during the bidding and selection process; (2) "several contracting officers" interviewed by the Commission made remarks against MBEs indicating that they may not exercise their discretion in favor of MBEs and "a few contracting officers" expressed the belief that MBEs are sloppy, inefficient, lacking in business acumen and knowledge of government processes, or just a lot of extra bother; and (3) state and local contracting officers "in general" believe that MBEs cannot be relied on to perform but lack evidence in support of the belief. *Id.* at 21-22, 107.

For a number of reasons, the above information is, at best, weak evidence of prior discrimination by DOT or its recipients. The research is outdated, having been conducted between 1973 and 1975. *Id.* at VII. It is not limited

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to support preference to minority-owned businesses on city contracts). *Compare United States v. Paradise*, 480 US. 149, 179, 107 S.Ct. 1053, 1071, 94 L.Ed. 2d 203 (1987).

to DOT contracting but apparently includes all federal agencies. The statistical validity or representativeness of the sample population is never discussed, and it is more anecdotal than statistical, with ambiguous generalizations such as "several," "a few," and "in general." A "feeling" by less than half of those interviewed is subject to the same criticism the Commission levels at the "belief" of state and local contracting officers —both are unsupported by any evidence.

Other "evidence" recited in Appendix II provides absolutely no support for an inference of prior discrimination by DOT or its recipients. Instead, the evidence is primarily of societal discrimination not traceable to DOT's actions and not included in the AADA's authorization of affirmative action by DOT. A few examples of such evidence, and brief analysis of each, follow:

1) Statistics on the disparity between the percentage of MBEs and their percentage share of gross business receipts for the nation, Appendix II at 2, are too broad to reveal anything about discrimination in the letting of DOT contracts;[18]

2) Statistics on the same disparity in the construction industry, *id*, are similarly too broad;

3) Remarks by legislators attributing such disparities to discrimination, without supporting evidence and without specifying who was doing the discriminating, *id*, at 5-6, establish only societal discrimination, not discrimination by DOT; and

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[18] As discussed in note 17, *supra*, the school board in *Wygant* relied on similarly mis-matched statistics.

4) "The operation of subtle forces" — such as a lack of equity capital, difficulty in securing financing, inability to obtain bonding, lack of adequate management and operational skills, and the state of the economy, *id*, at 7-9 — is, at most, a form of societal discrimination beyond DOT's competence or authority to address.

Third, the data referenced in the preambles to the May 17, 1979 NPRM and the March 31, 1980 final rule do not provide "a strong basis in evidence for [DOT's] conclusion that remedial action was necessary." The preambles contain only two arguably relevant statistics. One statistic reveals a disparity between the percentage of all businesses in the United States owned by minorities (three percent) and MBE participation in all DOT financial assistance (two percent in 1979, up from one percent in 1977). 45 Fed.Reg. at 21174 (final rule); 44 Fed.Reg. 28929 (NPRM). The second statistic reveals a disparity between the percentage of all businesses in the United States owned by MBEs (three percent) and the percentage of DOT grants going to MBEs in 1979 (MBEs received $360,456,000 of $13,300,000,000, or 2.7 percent). Statistical disparities may serve as circumstantial evidence of discrimination but cannot, standing alone, establish discrimination unless "the statistical evidence of racially disproportionate impact is so strong as to permit no inference other than that the results are the product of a racially discriminatory intent or purpose." *McCleskey v. Kemp*, 753 F.2d 877, 889 (11th Cir.1985), *cert granted*, 478 U.S. 1019, 106 S.Ct. 3331, 92 L.Ed.2d 737 (1986). The disparities identified above simply are not so large that they preclude every inference other than that DOT or its recipients had discriminated in their contracting. Indeed, DOT itself

identified a number of reasons, other than discrimination, for the disparities, including the financing, bonding, and experience problems discussed in connection with Appendix II. See 45 Fed.Reg. 28929.

In addition to its reliance on the three categories of "findings" of discrimination discussed above, DOT points to the decision in *M.C. West*, 522 F.Supp. 338, as support for its argument that the MBE requirement is based on sufficient findings of prior discrimination. The court in *M.C. West* agreed with DOT that its MBE regulation was supported by adequate findings for two reasons. The first, that the "Notice and Comment adversary-like process . . . is sufficient for an agency to make findings in support of its rule changes," *id.* at 347, has already been dealt with. *See* n. 15 and accompanying text *supra*.

The second reason given by the court in *M.C. West* was that "findings of discrimination by the Congress . . . regarding other similar legislation" were a sufficient basis for DOT's MBE regulation. *Id.* at 349. The "other similar legislation" referred to was the Public Works Employment Act (PWEA) of 1977, 42 U.S.C. § 6701 *et seq.* The PWEA was upheld by the Supreme Court in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980).

At first glance, the result in *Fullilove* seems to favor DOT's argument that its findings in this case were sufficient, because Congress's findings in support of the PWEA were scanty. Justice Powell, in his concurring opinion in *Fullilove*, implied that the legislative history of the PWEA, standing alone, did not contain sufficient findings of prior discrimination. *Id.* at 502-03, 100 S.Ct. at

2787. However, because Congress is a legislative body, the Court looked beyond the legislative history of the particular act and examined "the total contemporary record of congressional action dealing with the problems of racial discrimination against minority business enterprises." *Id.* at 503, 100 S.Ct. at 2787.

DOT now argues essentially that Congress's scanty findings in support of the PWEA are also sufficient support for its own MBE regulation. The flaw in DOT's "if it's good enough for Congress, it's good enough for DOT" argument is that DOT is not Congress. DOT is an administrative agency whose authority is much more limited and whose procedures are subject to much more scrutiny than are the power and procedures of Congress. Three of the six majority justices in *Fullilove* repeatedly emphasized that their decision to uphold the PWEA was based in large part on two considerations: first, "the legislative authority of Congress" specifically delegated by the Constitution, particularly section five of the fourteenth amendment; and second, the electoral accountability of Congress as a "politically responsive branch[ ] of Government." *Id.* at 480, 490, 100 S.Ct. at 2776, 2781 (opinion of Burger, C.J.). The difference in authority and accountability between Congress and non-legislative bodies had direct bearing on the necessary extent of supporting findings: "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or *administrative* proceedings." *Id.* at 478, 100 S.Ct. at 2774 (emphasis added).[19]

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[19] The special authority of Congress, under section 5 of the fourteenth amendment, to remedy the effects of prior discrimination, also ex-

Justice Powell also recognized the distinction:

> Congress is not an adjudicatory body called upon to resolve specific disputes between competing adversaries. Its constitutional role is to be representative rather than impartial, to make policy rather than to apply settled principles of law.... The creation of national rules for the governance of our society simply does not entail the same concept of record making that is appropriate to a judicial or *administrative* proceeding.

Id. at 502, 100 S.Ct. at 2787 (emphasis supplied). In fact, Justice Powell explicitly noted that "the discriminatory activities [addressed by the PWEA] were not identified with the exactitude expected in judicial or *administrative* adjudication." *Id.* at 506, 100 S.Ct. at 2789 (emphasis added). At another point, Justice Powell wrote,

> The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body.

Id. at 515-16 n. 14, 100 S.Ct. at 2794 n. 14. Justice Powell concluded by reiterating that the result in *Fullilove* depended on Congress's unique status:

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plains the absence in *Fullilove* of findings that *Congress* had engaged in prior discrimination. *Cf. Wygant*, 106 S.Ct. at 1847 (requiring "some showing of prior discrimination by the govenmental unit involved"). Unlike administrative agencies and other non-elected governmental bodies with limited authority, Congress has the authority both to find and to remedy the constitutional or statutory violations of others. *See Bakke*, 438 U.S. at 307-10, 98 S.Ct. at 2757-59 (Opinion of Powell, J.).

> [T]he issue here turns on the scope of congressional power, and Congress has been given a unique constitutional role in the enforcement of the post-Civil War Amendments.

Id. at 516, 100 S.Ct. at 2794.

Likewise, the Eleventh Circuit has noted the justices' emphasis on the nature of the governmental body adopting the affirmative action program:

> Both Chief Justice Burger and Justice Powell's opinions stress the fact that the statute in *Fullilove* was passed by Congress and should therefore be judged with deference to Congress' broad powers .... Their emphasis on the fact that the Court was reviewing a congressional statute suggests that constitutionally acceptable means of redressing past discrimination vary with the powers of the government body enacting the legislation.

South Florida Chapter, 723 F.2d at 851. *See also Central Alabama Paving*, 499 F.Supp. at 634 (declining to follow *Fullilove* and striking down DOT's MBE regulation because an agency, rather than Congress, was requiring disparate treatment based on race).

The minimum teaching of *Fullilove* is that an agency's "findings" of prior discrimination must be at least somewhat more substantial than those made by Congress for the PWEA.[20] As the foregoing discussion

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[20] *See* Note 53, U.Chi.L.Rev. at 618-20:

> There is less reason to defer to the agency because, unlike Congress, the agency does not have direct or co-equal

makes clear, DOT's "findings" for the MBE regulation are no more substantial than were Congress's in *Fullilove*. Therefore, DOT has failed to establish a compelling governmental interest to justify its racial classification.[21]

B. *Whether the Regulation is Narrowly Tailored.*

The Eleventh Circuit has formulated the "narrowly tailored" standard as follows:

> Legislation employing benign racial preferences ... must incorporate sufficient safeguards to allow a reviewing court to conclude that the program will be neither utilized to an extent nor continued in duration beyond the point needed to redress the effects of the past discrimination.... [T]he program must be structured in such a way that it is subject to reassessment and will be implemented in a manner that is flexible

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> authority to define constitutional violations. This difference between congressional and direct legislative authority suggests that more particularized findings should be required before agencies can adopt remedial plans.... Such findings could include specific identification of those who discriminatcd or were discriminated against, and might include detailed statistical information.

(Footnote ommitted).

[21] The following cases have upheld MBE programs imposed by state *legislative* bodies: *South Florida Chapter*, 723 F.2d 846 (11th Cir.1986) (county commission); *J.A. Croson Company*, 779 F.2d 181 (4th Cir.1985) (city council); *Associated General Contractors v. City and County of San Francisco*, 619 F.Supp. 334 (N.D.Cal.1985) (city and county board of supervisors); *Michigan Roadbuilders Association, Inc v. Milliken*, 571 F.Supp. 173 (E.D.Mich.1983) (state legislature). *See also* cases cited in Note 53 U.Chi.L. Rev. at 594, notes 60-66.

> enough to account for changing needs and circumstances.

Id. at 852. The Supreme Court apparently has adopted a similar standard, which is discussed *infra*, at 1494-95.

Careful comparison of the affirmative action plans upheld by the Supreme Court in *Fullilove* and by the Eleventh Circuit in *South Florida Chapter* reveals critical, and constitutionally fatal, shortcomings in the MBE regulation at issue here.[22] The MBE set aside in *Fullilove* shared certain characteristics with DOT's MBE regulation, including detailed definitions of MBEs that allow "weeding out" sham MBEs and a waiver where "best efforts" did not succeed in meeting the MBE goal. *Compare* 448 U.S. at 487-88, 100 S.Ct. at 2779-80 (Opinion of Burger, C.J.) *with* 49 C.F.R. § 23.53 and § 23.45(h)(2). But the MBE program in *Fullilove* went further than DOT's MBE regulation. *Fullilove's* MBE program provided two additional assurances "that misapplications of the program [would] be promptly and adequately remedied administratively." *Id.* at 487, 100 S.Ct. at 2779. It provided an administrative complaint procedure for reporting "unjust participation" by enterprises that were not bona fide

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[22] It may be that an MBE goal or set-aside established by a non-legislative body (other than a court) can never be narrowly tailored enough to pass constitutional muster. *See Fullilove*, 448 US. at 515 n. 14, 100 S.Ct. at 2794 n. 14, where Justice Powell wrote:

> My view that this set-aside is within the discretion of Congress does not imply that other methods are unavailable to Congress. Nor do I conclude that use of a set-aside always will be an appropriate remedy or that the selection of a set-aside by any other governmental body would be constitutional.

MBEs and provided for a special waiver "to avoid dealing with an MBE who was attempting to exploit the remedial aspects of the program by charging an unreasonable price, i.e., a price not attributable to the present effects of past discrimination." *Id.* at 488, 100 S.Ct. at 2780. DOT's MBE program provides neither safeguard.

Other characteristics of the MBE program in *Fullilove* provided additional "assurance that application of racial or ethnic criteria [would] be limited to accomplishing the remedial objectives of Congress." *Id.* at 487, 100 S.Ct. at 2779. First, the program's definition of an MBE was limited to "those whose competitive position is impaired by the effects of disadvantage and discrimination." *Id.* at 471, 100 S.Ct. at 2771 (Opinion of Burger, C.J.); *see also id.* at 487, 100 S.Ct. at 2779 (Congress's objective was to assure "legitimate participation by *disadvantaged* MBEs") (emphasis supplied). The MBE definition's insistence on minority status *and* disadvantage helped to ensure that the PWEA's MBE program was not over-inclusive, bestowing "a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination." *Id.* at 486, 100 S.Ct. at 2779.[23] Second, the program in *Fullilove* was "a pilot pro-

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[23] It seems to this court that requiring actual disadvantage is an essential ingredient in today's environment. Since the days of the civil rights struggles in the sixties two things at least have changed. First, many of the recipients are governed by "minorities," as is the case with Fulton County. Second, there are many more MBEs that are well financed and professionally accomplished. To insist, for example, that black leaders should give favor to well-situated black businessmen

ject, appropriately limited in extent and duration, and subject to reassessment and re-evaluation by the Congress prior to any extension or re-enactment." *Id.* at 489, 100 S.Ct. at 2780 (footnote omitted). The PWEA, enacted in May 1977, authorized $4 billion to fund "Round II" of the Economic Development Administration's program of grants to local public works projects. All of the federal money was to be committed to grantees by September 30, 1977. *Id.* at 511 n. 10, 100 S.Ct. at 2792 n. 10 (Powell, J., concurring). The PWEA's limited duration satisfied the justices' concern that "a race conscious program will not last longer than the discriminatory effects it is designed to eliminate." *Id.* at 513, 100 S.Ct. at 2792-93. *See also Local 28 of the Sheet Metal Workers International Association v. EEOC*, 478 U.S. 421, 477, 106 S.Ct. 3019, 3051, 92 L.Ed. 2d 344 (1986) (court-ordered affirmative action plan scheduled to end as soon as the percentage of minority union members approximated the percentage of minorities in the local labor force).

By contrast, DOT's MBE regulation does not narrowly define MBEs to include only disadvantaged minority businesses. Nothing in the regulation would prevent the award of a subcontract to a firm owned by non-disadvantaged minorities, even if that firm's bid exceeded the bids of non-minority firms, so long as the firm's bid was lower than any other minority firms' bids. In fact, the regulation may require that result. The regulation is therefore over-inclusive in a way that the regulation at issue in *Fullilove* was not. While the over-inclusiveness, standing alone, may not invalidate the regulation, it is

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does infinitely more to legitimize cronyism that to remedy any vestigial effect of discrimination in some locales.

additional evidence that DOT's MBE regulation is not narrowly tailored.[24]

Also, DOT's MBE regulation has no durational limit and is subject to little or no re-evaluation by the agency or by Congress. The arguments of *amici curiae* the Progressive Alliance and the Joint Entrepreneurial Traders Association (PA/JETA) to the contrary are unpersuasive. The fact that the AADA implements an appropriations statute that must be reenacted periodically does not ensure sufficient congressional oversight of the MBE program. For one thing, the MBE program is not contained in the AADA itself but in a regulation that cites the AADA as one of several sources of authority. As a result, Congress is likely to debate only the appropriations statute, not the implementing statute and not the regulation that claims authorization under the implementing statute. Moreover, the period between enactments is substantially longer than was the case for the PWEA—the AADA was

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[24] DOTs definition of "minority" may itself be over-inclusive and not sufficiently narrowly tailored. Three justices in *Wygant* criticized a similar definition of minority:

> The Board's definition of minority to include blacks, Orientals, American Indians, and persons of Spanish descent . . . further illustrates the undifferentiated nature of the plan. There is no explanation of why the Board chose to favor these particular minorities or how in fact members of some of the categories can be identified. Moreover, respondents have never suggested—much less formally found-that they have engaged in prior, purposeful discrimination against members of each of these minority groups.

106 S.Ct. at 1852 n. 13 (Opinion of Powell, J.). DOT's definition of minority is subject to substantially the same criticisms.

originally enacted in 1970; it was amended in 1976, in part to include a civil rights provision; and the AAIA was adopted in 1982 and is funded through October 1, 1987. *See* 26 U.S.C. § 9502(d)(1)(A).

The *amici's* argument that the regulation is subject to periodic review by DOT is disingenuous. *Amici* point to DOT's characterization of the April 27, 1981 final rule as an "interim" measure and its indication that it would later prepare a comprehensive revision of the entire MBE rule. *Amici* fail to point out, however, that DOT was describing as "interim" only its amendment to the contract award mechanism substituting the present "good faith effort" provisions for the "conclusive presumption" approach challenged in *Central Alabama Paving*, 499 F.Supp. 629. *Amici* also ignore the fact that almost six years after the April 27, 1981 final rule, no comprehensive revision has occurred.

Finally, *amici* PA/JETA argue that the regulation's provision for case-by-case exemptions, 49 C.F.R. § 233.41(f), assures adequate opportunity for re-evaluation of the regulation. *Amici* offer no evidence on the frequency with which exemptions are requested or granted, nor do they offer any indication of what types of situations DOT will consider "exceptional" and therefore proper for exemption. In any event, it is clear that the exemption provision does not extend to wholesale revision of the MBE program.

The lack of adequate safeguards in DOT's MBE program is also illustrated by comparison with the MBE program upheld in *South Florida Chapter*. The county ordinance in *South Florida Chapter* required that any pro-

posed MBE set aside or goal pass through three levels of administrative review, including the county manager, a three-member Contract Review Committee, and the board of county commissioners. 723 F.2d at 853. In addition, the board of county commissioners was required *annually* to "reassess the continuing desirability and viability of the program." *Id.* The county manager was required to monitor continually the program's use, to report its findings periodically, and to provide an annual report to the board for use in its annual review. *Id.* at 853-54. It is readily apparent that DOT's MBE program incorporates virtually no safeguards like those found in *South Florida Chapter.*

Because DOT's MBE program lacks "adequate assurances that the . . . program will not be used to an extent nor continue in duration beyond the point necessary to redress the effects of past discrimination," *id.* at 854, it is not narrowly tailored to its stated objective and violates the equal protection component of the fifth amendment.

DOT's MBE regulation also fails to satisfy the "narrowly tailored" standard applied by a plurality of the Supreme Court in *United States v. Paradise,* 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987).[25] Justice Brennan described the standard as follows:

> In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and

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[25] The standard was articulated by Justice Brennan in an opinion joined by three other Justices, citing previous opinions by a total of five Justices. 480 U.S. at 171, 107 S.Ct. at 1067.

> duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Id. 480 U.S. at 171, 107 S.Ct. at 1067.

DOT's MBE regulation was not necessary to remedy the effects of prior discrimination by DOT. First, no such discrimination was ever established. *See supra*, at 1487-91. Second, any societal discrimination revealed by DOT's "findings" could be remedied just as effectively, if not more effectively, by other measures. For example, an MBE regulation does little to remove the barriers posed by "subtle forces" such as a lack of equity capital, difficulty in securing financing, inability to obtain bonding, and lack of adequate management and operational skills. *See supra*, at 1489. More effective measures would be targeted directly at the underlying causes, not merely the visible result, and might include vigorous enforcement of existing laws prohibiting discrimination in financing and bonding and the government provision of training in how to obtain government contracts. Agency-imposed discrimination bypasses the original problems and creates its own new problems, including encouraging citizens to classify themselves and others in terms of their race rather than their individual merit.

As discussed in detail earlier, the MBE regulation is not sufficiently flexible or of acceptable duration. The regulation does not compare any more favorably with the remedy approved in *Paradise* than with those approved in *Fullilove* and *South Florida Chapter*. The one-for-one

promotion requirement in *Paradise* was sufficiently flexible primarily because its term of application was controlled by the Department of Public Safety against which it was imposed. 480 U.S. at 179, 107 S.Ct. at 1071. The requirement was to be enforced only until the Department adopted a non-discriminatory system of promotions, something the Department had been enjoined to do and had promised to do. In its actual application, the requirement was suspended after one round of promotions. *Id.* The regulation at issue here does not approach the requirement in *Paradise* in terms of flexibility or duration.

The third and fourth factors in *Paradise* are of little significance in this case. The regulation does not itself set any numerical goals but instead requires recipients to "set goals that are practical and related to the potential availability of MBEs in desired areas of expertise." 49 Fed.Reg. § 23.45(g)(1). At least in its application, the regulation therefore requires the proper relationship between numerical goals and the relevant market.[26] The impact of the relief on the rights of third parties in this case is indistinguishable from that of the MBE program approved in *Fullilove*, which the Court held did not "impermissibly deprive[ ] non-minority businesses of access" to government contracting opportunities. 448 U.S. at 484, 100 S.Ct. at 2777.

Finally, there is some doubt that the goals provision is addressed at all to an identifiable residual effect of discrimination. As noted earlier, three percent of the nation's businesses were minority owned in 1979 and 2.7

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[26] It is still true, however, that in its *justification* (i.e., DOT's "findings") the regulation mismatches statistics. *See supra*, nn. 17-18.

percent of DOT funds went to MBEs that year. In the employment context it is doubtful if this level of disparity would be found sufficient to justify race-conscious hiring or promotion. *Compare United Steel Workers of America v. Weber*, 443 U.S. 193, 198-99, 99 S.Ct. 2721, 2724-25, 61 L.Ed.2d 480 (1979) (1.83 percent black employees where thirty-nine percent of work force in the area was black). In any event it seems clear that the goals would be dispensed with once parity was reached. *Weber*, 443 U.S. at 208-09, 99 S.Ct. at 2730; *Sheet Metal Workers*, 478 U.S. at 477, 106 S.Ct. at 3051. The same analysis is appropriate here. The aim of affirmative action in the employment cases is to put minorities into jobs and paths of advancement previously closed to them. The thought is that, with the passage of time and the continuation of affirmative outreach programs, stereotypes will be broken down and minorities will have equal opportunities for promotion. For an entrepreneur, goals and quotas should last only so long as necessary for those with venture capital to feel assured that backing an MBE is a risk not made unreasonable solely because of artificial barriers such as race or sex, long enough for today's would-be entrepreneurs to have some experience in the kind of work heretofore denied them, and long enough that the presence of MBEs in the field is not so rare as to be remarkable. Whether we have reached this point the court cannot say, but we have progressed sufficiently to say that the matter is not beyond debate. The DOT regulation ought to be monitoring concerns such as these in considering whether to continue the "goals" portion of its affirmative action program with every recipient or at all. The regulation's failure to address these concerns is an additional reason that the regulation cannot be described as narrowly tailored.

IV. CONCLUSION.

In summary, DOT's MBE regulation is rooted in a grant of legislative authority by Congress, the AADA of 1976, and therefore would have the force and effect of law if it were constitutional. However, the regulation is unconstitutional because it violates the fifth amendment's equal protection component. First, the regulation is not justified by a compelling governmental interest. DOT lacked a strong basis in evidence for its conclusion that remedial action was necessary because the "findings" it relied on in developing the regulation do not even begin to demonstrate that DOT or its recipients had in the past discriminated in letting contracts. Second, even if the regulation is supported by adequate findings of prior discrimination, it is not narrowly tailored to remedy the effects of that discrimination. The regulation gives little assurance that it will not be misapplied and gives virtually no assurance that its operation will be limited to accomplishing its remedial objective

For the foregoing reasons, the plaintiffs' motion for summary judgment on counts IX and X of their complaint is GRANTED. The federal defendants' motion for summary judgment on the same counts is DENIED.[27]

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[27] The Supreme Court's recent decision in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987), has no application to these motions. *Johnson* decided "only the issue of the prohibitory scope of Title VII"; no constitutional issue was either raised or addressed in that case. *Id.* at 620 n. 2, 107 S.Ct. at 1446 n, 2

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

S.J. GROVES & SONS COMPANY, and JASPER CONSTRUCTION COMPANY, Plaintiffs,	:	
vs.	:	CIVIL ACTION NO. C82-1895A
FULTON COUNTY, GEORGIA, Defendant.	:	

ORDER

This action, in which plaintiffs challenge certain of the defendant's actions as being in violation of both state law and the plaintiffs' constitutional rights, is before the court on cross motions for summary judgment. Oral argument has been held, at the request of the parties, and the motions are now ripe for decision. There are myriad issues raised by this case, but the resolution of the issues is not particularly complicated. Due to the volume of questions to be decided, however, the court will subdivide its discussion of this case.

A. *THE FACTS.*

The defendant Fulton County, in 1979, enacted a resolution which called for a goal of twenty percent participation by minority business enterprises (hereinafter MBEs) in all county procurement and other contracts. The plaintiffs before this court, large non-minority owned construction companies, never bid on any county project governed by

the 1979 Resolution. Clarence Reid Second Affidavit, ¶3. However, in 1982, the plaintiff S.J. Groves & Sons presented a bid on a runway resurfacing project at the Fulton County Airport Brown Field (hereinafter Brown Field).

The background to the runway resurfacing project at the airport is as follows. Brown Field is a designated "reliever" airport for the Atlanta metropolitan area, which means that it is a designated alternative destination for freight and cargo flights away from the primary passenger airport in the area, Hartsfield International. Wendell Phillips Affidavit, ¶¶1-4. The instrumented runway at Brown Field, as of 1981, was determined to be in a rapidly deteriorating condition, and the Federal Aviation Administration (hereinafter FAA) threatened to close down the runway, which would result in Brown Field losing its designation as a reliever airport. *Id.* Therefore, the Fulton County Board of Commissioners determined that it would be necessary to renovate the runway. In order to do this, Fulton County applied for a grant from the Federal Aviation Administration of the Federal Department of Transportation, pursuant to the Airport and Airway Development Act of 1970, as amended. Under that program, the federal government would fund ninety percent of the airport renovation, while the state of Georgia would fund five percent, and Fulton County would fund five percent.

As a condition of receiving the FAA grant, Fulton County was required to prepare and submit for approval by the FAA a minority business enterprise program for the project. 49 C.F.R. §23.1 *et seq.* In compliance with the afore-cited regulation, Fulton County prepared an MBE program for the Brown Field project, which called for bidders to achieve a twenty percent minority, and two percent female, partici-

pation in the project. *See* 49 C.F.R. §23.45(g). A contractor who was unable to meet those goals, however, could still be awarded the contract upon satisfying Fulton County that a good faith effort to meet those goals had been made. 49 C.F.R. §23.45(h). The regulations provide that meeting the goals, or making a good faith effort to meet the goals, is a condition of Fulton County's receiving the DOT-assisted contract. 49 C.F.R. §23.45(h)(3). The program which was developed by Fulton County, submitted to, and approved by the FAA, was developed solely to comply with the regulatory requirements, and was not related in any way to the 1979 Resolution. Clarence Reid Second Affidavit, ¶2; Samuel Brownlee Depo., p. 8; Wendell Phillips Depo., pp. 6-12; Clarke Sharpe Affidavit, ¶¶5-7, 12-13; Wendell Phillips Affidavit, ¶¶6-8. The numbers selected by the county, twenty percent minority and two percent women, were based upon the availability of MBEs in the area, taking into account prior successes with MBE programs, including those of the city of Atlanta, and the Metropolitan Atlanta Rapid Transit Authority (hereinafter MARTA). *See* 49 C.F.R. §23.45(g)(1); Clarence Reid First Affidavit, ¶4.

As noted above, the only Fulton County project on which the plaintiffs have ever bid was this runway project. Clarence Reid Third Affidavit, ¶2. However, the plaintiffs have received several state contracts, which were funded by the federal government, subject to the provisions of 49 C.F.R. §23.45, and the plaintiffs have met the MBE goals on those projects. Alton G. Wiggers Affidavit, ¶4. The bid which plaintiffs submitted on the Brown Field project was the lowest dollar bid received by the county, at $818,432.40. The MBE participation percentage given by the plaintiff was 4.15%, a number which was not documented as required by

the bid specifications. The second lowest bid received by the county was one from Dickerson, Inc., at $840,960.00, with an MBE participation level of ten percent. The third lowest bid received was that of a joint venture entitled APAC-Georgia & Randolph, Inc., at $873,499.90, with an MBE participation level of twenty-two percent. At the County Commission's regular meeting on July 7, 1982, the county conditionally awarded the contract to S.J. Groves & Sons, provided that Groves make a good faith effort to increase its minority participation. Commissioner Reginald Eaves offered to assist the plaintiffs in finding eligible MBEs to take over part of the work, and the Commission additionally instructed the plaintiff to meet with Clarence Reid, the county's affirmative action coordinator.

At this point, the facts become disputed. Joseph Villadsen, the area engineer for S.J. Groves & Sons, contacted Clarence Reid, and according to Villadsen, explained that because Groves had its own asphalt plant and trucks, the heart of the contract, which was paving, was exempt from any subcontracting consideration. Reid thereafter, according to Villadsen, agreed to send Villadsen a list of MBEs who handled the type of work called for by the project, and Villadsen thereafter sent letters to all of the MBEs on that list. According to Villadsen, he received only five responses, four of which indicated that the minority business did not perform the type of work necessary, and the fifth one of which was for sealing the runway, at a price more than four times Groves' bid price. Thereafter, on August 3, 1982, Villadsen called Reid to explain that he had been unable to increase his MBE participation from more than 4.15%. Reid said that to him, after hearing what Villadsen had to say about the efforts he had taken, it sounded as if Groves had

used a good faith effort, and Villadsen should send a letter to the county manager explaining what actions he had taken. Villadsen Depo., pp. 9, 25-28, 32, 34-35, 37, 44, 51-52, 60.

According to Clarence Reid, he and Villadsen discussed what portions of the contract could be subcontracted to MBEs, and Reid tried to convince Villadsen that perhaps he should use minority subcontractors on some of the portions of the contract which Villadsen considered to be exempt from subcontracting. Additionally, according to Reid, he suggested that Villadsen attempt to obtain minority business participation in provision of such things as office supplies and equipment repair, in order to increase the percentage. Reid sent Villadsen a list of contractors who, in Reid's opinion, might be able to help Villadsen increase his minority participation. Reid thereafter heard nothing from Villadsen for a month, when Villadsen called back and stated that he was still at 4.15% minority participation, and would be unable to increase it. According to Reid, Villadsen did not tell him what efforts he had made to increase the participation, other than having written several minority contractors on Reid's list, and obtaining back only four or five responses. Villadsen did not say what, if any, negotiations or additional efforts he had taken with the minority enterprises who contacted him. Additionally, according to Reid, on both occasions when he spoke to Villadsen, Villadsen threatened that to subcontract the work on this project would require Villadsen to lay off his minority employees. Reid First Affidavit , ¶¶12-13; Reid Depo., pp. 98-101, 104-107, 114, 116. Villadsen denied making the threatening remarks regarding minority employees. Villadsen Depo., pp. 37-60.

Furthermore, according to Reid, he had received a telephone call the same day Villadsen made his second call from Wendell Phillips, Fulton County's manager at Brown Field, who related that the FAA was getting concerned that if work did not begin on the airport project before the onslaught of winter weather, the airport runway would be closed. Therefore, Phillips urged Reid that the matter should be brought up before the County Commission meeting on the next day. According to Reid, he passed this information on to Villadsen, and told Villadsen that he should set out in a letter to the county manager all of the efforts he had taken to increase his minority participation, and get the letter to Mr. Brownlee (the county manager) that day, August 3, 1982. Reid Depo., pp. 104-116. Villadsen denies that Reid urged him to act with any speed. Villadsen Depo. at 60.

Contrary to Villadsen's testimony, Reid testified that he did not think that Groves had used good faith efforts; indeed, he drafted a memorandum to Sam Brownlee saying so. This memorandum, dated August 3, 1982, is contained in the minutes of the Board of Commissioners August 4, 1982 meeting. In it, Reid relates his determination that Groves had not used good faith efforts to increase minority participation based upon four factors: (1) the fact that Groves exempted the heart of the contract from subcontracting considerations; (2) that Groves did not follow up Reid's suggestions for increasing minority participation; (3) Villadsen's threats to lay off minority employees; and (4) Reid stated that he had contacted the state of Georgia contract compliance officials, who stated that it was very difficult to make Groves meet their minority requirements on

state contracts. Alice Smith First Affidavit, Exhibit G. *See also* Reid Depo., pp. 125-43.

At the August 4, 1982 meeting, based largely upon the Reid memorandum, the County Commission determined that the plaintiff had not used good faith efforts to increase its minority participation, thus voiding the conditional award of the contract to Groves. Michael Lomax First Affidavit, ¶3. Commissioners Eaves, Farris, Roach, Williams, and Lomax, all testified on deposition that they had made their own determinations that Groves had not used good faith efforts, based upon the memorandum from Clarence Reid. Eaves Depo., pp. 14-15; Farris Depo., pp. 48-49; Roach Depo., pp. 32-33; Williams Depo., pp. 41-50; Lomax Depo., pp. 5, 7, 9, 21-22. Additionally, Eaves testified that one of the factors governing his determination of no good faith was the fact that although he had offered his assistance, plaintiffs never requested it. Eaves Depo., pp. 6-7; 9-15. Thereafter, the County Commission conditionally awarded the contract to the second lowest bidder, Dickerson, Inc., which had an MBE participation level of ten percent in its bid. The award was conditioned upon Dickerson's good faith efforts to increase its minority participation, and the Board empowered Lomax, together with Brownlee and Reid, too determine whether those good faith efforts were made. Two days following the conditional award of the contract, Dickerson informed Reid that it had increased its minority participation from ten percent to sixteen percent.

Lomax, Reid, and Brownlee determined that a six percent increase in two days constituted a good faith effort on the part of Dickerson, and Lomax signed the contract awarding the project to Dickerson, Inc.

Thereafter, the plaintiff brought the instant action in which plaintiff asserted certain breach of contract, and breach of duties under state law claims against the defendant, and later amended that complaint to add a facial challenge under the Federal Constitution to the 1979 Resolution discussed above. Discovery proceeded, and cross motions for summary judgment were filed. Thereafter, on June 6, 1984, the county replaced in toto the 1979 Resolution with what this court will term the 1984 Resolution. Plaintiffs promptly moved to amend their complaint to delete the challenge to the 1979 Resolution, and replace it with a challenge to the 1984 Resolution, a motion which this court granted.

The facts underlying the passage of the 1984 Resolution, which are undisputed, are as follows. The County Commission ordered Clarence Reid, the county's affirmative action officer, to conduct a study of minority business participation in Fulton County. The Reid study was conducted by personal meetings, compilation of data, and looking to other local governments and MARTA for their experience with minority businesses. Sixth Reid Affidavit, ¶4. The ultimate conclusion of the Reid study was that minority businesses participate in county purchasing and contracting at a disproportionately low level given minority population in the county, and that this difference is due to systemic racial discrimination, which has been in existence for a period of years. Sixth Reid Affidavit, ¶7.

Based upon the Reid study, and the volumes of documents which supported it (see Plaintiffs' Exhibit 28), the County Commission on April 4, 1984, directed the county manager to develop a minority business enterprise program.

Based upon the statistics and information, as well as the remainder of the information contained in Plaintiffs' Exhibit 28, the county on June 6, 1984 enacted the 1984 minority business participation resolution, which kept in place the goal of twenty percent minority participation and contracting. That program is subject to continual administrative review, and additionally may be changed by the Board of Commissioners at any time. Sixth Reid Affidavit, ¶¶11,15.

The plaintiffs' amended complaint alleges that the 1984 Resolution injures them, seeks declaratory relief that it is unconstitutional, and requests injunctive relief against its enforcement. The second affidavit of Joseph Villadsen, at paragraph six, clarifies that the injuries alleged by the plaintiffs, from the 1984 Resolution, are that it adversely affects their competitive position vis-a-vis other bidders, it discourages them from bidding on county projects, and it threatens the plaintiffs with the loss of future profits and overhead. Based upon that alleged injury, plaintiffs seek to have the 1984 Resolution declared invalid. The amended complaint is cast in eight counts. Count I alleges that the County has breached its promise as contained in the invitation to bid on the airport project; Count II alleges that the county has breached its duty under O.C.G.A. §36-10-2, to award the public works contract on the airport to the lowest bidder; Count III alleges a violation of the due process clause of the state constitution, as respects the airport program; Count IV is a challenge pursuant to Title VI (42 USC §2000d, *et seq.*) to the airport program; Count V challenges the airport program under the equal protection clause of the United States Constitution; Count VI is an equal protection challenge to the 1984 Resolution; Count VII challenges the 1984 Resolution as being in violation of O.C.G.A. §36-10-2

(the low bid statute); and Count VIII challenges the 1984 Resolution as being violative of Title VI (42 USC §2000d, *et seq.*).

B. *THE PENDING MOTIONS.*

As is apparent from the foregoing discussion of plaintiffs' third amended complaint, the actions of Fulton County which are challenged in this lawsuit are two: first, the enactment of the airport program in 1982; and second, the enactment of the MBE resolution in 1984. The court will address arguments relating to each of these separately. However, indeference to the prudential rule that courts avoid deciding constitutional questions when they can, the court first addresses plaintiff's state law claim relating to O.C.G.A. §36-10-2.

1. *The Low-Bid Statute.*

The plaintiffs' motion for summary judgment challenges the validity of both the airport program and the 1984 Resolution under O.C.G.A. §36-10-2. The defendant has filed a cross-motion for summary judgment, asserting that neither program violates the low-bid statute, and arguing in the alternative that even if the airport program violates the statute, the statute is preempted by the federal regulations requiring the program. The preemption argument is discussed below. For the present, the court considers whether a county in the state of Georgia has authority, under state law, to enact race-conscious contracting requirements. The court concludes that it does not. The court would note at the outset that this is, by no means, an easy determination for this court. The question is a close one, and probably should be certified to the Supreme Court of Georgia. The court cannot merely abstain from deciding it, however, because reso-

lution of the federal constitutional issues will depend upon whether the county had "authority" under state law to enact the programs. *See South Florida Chapter of the Associated General Contractors of America vs. Metropolitan Dade County, Florida*, 723 F.2d 846, 850 (11th Cir.), *reh. denied*, 729 F.2d 1468, *cert. denied*, _____ U.S. _____, 105 S. Ct. 220 (1984).

Georgia's low-bid statute provides as follows:

> Whenever it becomes necessary to build or repair any courthouse, jail, bridge, causeway, or other public works in any county, the county governing authority shall cause the same to be built or repaired by letting out the contract therefor to the lowest bidder, at public outcry, before the courthouse door, after having advertised the letting of the contracts, ... provided that such county authority shall have the authority to reject any and all bids at the public letting. If, in their discretion, the public interest and economy require it, the county authorities may build or repair any public buildings, bridges, causeways, or other public property in the county by contract or sealed proposals, ...

O.C.G.A. §36-10-2. The language of this statute is quite clear, and presents counties with two means by which they can arrange for contracting to repair or build public works. First, the county could have, by public outcry outside the courthouse door, a verbal "auction," at which they may reject the bids received. Alternatively, the county may choose to let the contract by sealed bids or proposals.

There is only one case in Georgia which has construed the overall meaning of this statute, and it was decided shortly after this statute was amended. In *Manly Building Co. vs. Newton*, 114 Ga. 245 (1901), the court noted that the original statute had no provision in it for rejecting any and all bids, nor did it allow for sealed bids or proposals. 114 Ga. at 249. In 1881, the Act was amended to add this language:

> Provided, that such county authority shall have authority to reject any and all bids at said public letting; and if in their discretion the public interest and economy require it, such county authorities may build or repair any public buildings, bridges, causeways, or other public property in the county, by contract or sealed proposals, to be invited under the same provisions as to specifications and like information as are provided in this act.

114 Ga. at 249-50. The Georgia Supreme Court in *Manly* was called upon to construe the overall meaning of the statute. In a unanimous Georgia Supreme Court decision, the Court held that the meaning of the statute is as follows:

> The plain meaning of the first section of the act as amended is, that county authorities may, after due advertisement, cause a court-house to be built by letting out the contract therefor to the lowest bidder at public outcry before the court-house door, or they may advertise for sealed proposals for the erection of the building, and let the contract thereunder. They may do either in the first instance; or they may, *if they have undertaken to let the contract to the lowest bidder before the court-*

> *house door and have rejected all bids*, then proceed to advertise for sealed proposals.

114 Ga. at 251 (emphasis supplied).

The Georgia Supreme Court's construction of this statute, which is binding on this court, states that the statute means, with respect to the "shall have authority to reject any and all bids at the public letting" language, that the county may only reject *all* bids, if, in their opinion, those who bid at the public letting before the court-house door have increased the price of the contract beyond its value. The Supreme Court noted as follows:

> The provision allowing the county to reject any and all bids was found to be necessary, we suppose, because of the fact that, by a combination between bidders at a public letting, the county might be forced to pay a price largely beyond the value of the work, and therefore be subject to imposition; hence, for the protection of a county, came the enactment of the provision giving the right to reject any and all bids at such letting.

114 Ga. at 250. The construction of Georgia's low-bid statute given by the Supreme Court of Georgia in the *Manly* case has been unaltered by the passage of time. No subsequent case has cast any form of shadow on that construction.

Indeed, a local law which was passed in 1941, applicable to all county purchasing, merely gives added weight to the interpretation placed upon O.C.G.A. §36-10-2 by the Supreme Court in *Manly*. In an act by the General Assembly entitled "County Purchasing Department," the General

Assembly provided that as to county purchasing of supplies, materials and equipment, [1]

> such work or labor or supplies, materials or equipment shall be procured only by contract on public letting founded on sealed bids ... The terms of such contracts, subject to such regulations and in conformity with law, shall be settled by the county attorney as an act of preliminary specification to a proposal for bids. *The agency letting the contract may reject all bids if it shall deem it for the interest of the county so to do; if not, it shall, without other consent or approval, award the contract to the lowest responsible bidder.*

1941 Georgia Laws, p. 411. This provision, applicable to all counties, on its face contemplates rejection of all bids, or acceptance of the lowest responsible bid. It places no discretion in the hands of the county to reject the lowest bid, alone, and accept the next lowest.[2]

The county has argued that its home rule charter provides authority for the enactment of a race-conscious affirmative action program, which may not necessarily mean award of a given contract to the lowest dollar bidder. The home rule provision is found at Article IX, Section 2,

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[1] The court acknowledges that the plaintiff in this case is a construction contractor. However, the challenge is to the 1984 Resolution as a whole, and the 1984 Resolution also governs purchasing of supplies, materials and equipment.

[2] The court acknowledges defendant's argument regarding the meaning of "responsive" or "responsible." This subject will be addressed below in this discussion.

Paragraph 1 of the Georgia Constitution, and reads as follows:

> The governing authority of each county shall have legislative power to adopt clearly reasonable ordinances, resolutions, or regulations relating to its property, affairs, and local government *for which no provision has been made by general law and which is not inconsistent with this constitution or any local law applicable thereto.*

Georgia Constitution Article IX, Section 2, Paragraph 1(a) (emphasis added). The county's argument is true, only insofar as the regulation it has enacted does not conflict with local law, the constitution, or general law. To the extent, however, that the Resolution does conflict with general law, such as the low-bid statute, it is the Resolution which is void. *Georgia Branch, Associated General Contractors of America, Inc. vs. City of Atlanta*, 253 Ga. 397, 399 (1984). Therefore, the Home Rule Charter will provide authority for the county's action only if, as a matter of Georgia law, the Resolution does not conflict with general law.

In *Georgia Branch, supra*, the city of Atlanta's MBE program, virtually identical to that of the county in this case, but for the percentages, was invalidated by the Supreme Court of Georgia . The purported authority for the city's action, inter alia, was the city of Atlanta's Home Rule Charter, which, in pertinent part, reads exactly the same as Fulton County's. O.C.G.A. §36-35-3(a). Thus, the defendant's effort to distinguish the *Georgia Branch* case on the grounds that there was no Home Rule Charter involved is unavailing.

Prior to discussing defendant's reasons why the *Georgia Branch* case is purported to be distinguishable, it is

helpful to examine the *Georgia Branch* case, its legal bases, and the cases it cites. As noted above, the city of Atlanta had enacted an ordinance for MBE participation which contained approximately the same limitations as the Resolution in this case. Fulton County has not suggested that the ordinance at issue in *Georgia Branch* was materially different from the one enacted by Fulton County. The Georgia Supreme Court, in a unanimous opinion, founded its invalidation of the ordinance on state law, avoiding federal constitutional questions. The court began by observing that under the city of Atlanta's charter, the city was required to make all contract awards to the "lowest and/or best bidder." 253 Ga. at 398. The court acknowledged that the concept of awarding a contract to the "lowest bidder" does not mean that the contract must be awarded to an unqualified bidder. Citing a case from the California Supreme Court, the Supreme Court of Georgia noted that the purpose of the charter requirement of awarding a contact to the "lowest and/or best bidder" is to award public contracts without favoritism, and without excessive cost, at the lowest price consistent with reasonable quality and expectation of completion. 253 Ga. at 399, citing *City of Inglewood-L.A. County Civic Center Authority vs. Superior Court*, 103 Cal. Rep. 601, 500 p.2d 601 (1972). The Georgia Supreme Court stated the California Supreme Court's holding as follows: "'Lowest responsible bidder' means the lowest bidder must be awarded the contract unless found not qualified. Beyond that, there was to be no award based upon degree of qualification." 253 Ga. at 399. In other words, the Georgia Supreme Court in *Georgia Branch* rejected the argument that the word "responsible" could include notions of social responsibility such as compliance with an affirmative action plan. Instead,

the court held that the word "responsible" was to mean qualified to do the job in question. *Id.*

In *Georgia Branch*, the court also examined two cases which discussed, and invalidated, local or municipal affirmative action plans. In *Arrington vs. Associated General Contractors*, 403 S. 2d 893 (S.Ct.Ala. 1981), a local ordinance of the city of Birmingham required an MBE participation of at least ten percent in all city contracts, subject to good faith efforts. 403 S.2d at 895-96. The Georgia Supreme Court cited with approval the determination of the Alabama Supreme Court in *Arrington* that the city ordinance conflicted with the state statute which required contracts to be let, "by free and open competitive bidding, on sealed bids, to the lowest responsible bidder." 253 Ga. at 399; *see also* 403 S. 2d at 898.

The final case cited with approval by the Supreme Court of Georgia in *Georgia Branch* was *Associated General Contractors of California vs. San Francisco Unified School District*, 616 F. 2d 1381 (9th Cir.), *cert. denied sub nom National Association of Minority Contractors vs. Associated General Contractors*, 449 U.S. 1061 (1980). In that case, the Ninth Circuit held, applying California law, that the statutory requirement of letting bids to the "lowest responsible bidder" meant that no factors could be considered other than the bid amount, the financial and skills qualifications of the bidder, and the quality of the bidder's past work. 253 Ga. at 399.

The Georgia Supreme Court, having cited the cases discussed above, then concluded as follows:

> We hold the legislative purpose in the Atlanta City Charter requirement of "lowest and/or best bidder" was to further the cause that contracts be awarded without favoritism to obtain reasonable

> quality at the lowest cost. The MFBE ordinance requiring certain percentages of contracts measured in dollar value be awarded on the basis of race and sex conflicts with the legislative intent and purpose embodied in the bid requirement. Therefore, the ordinance is void.

253 Ga. at 399. The court rejected the city's argument that because its charter also authorizes it to make "rules" governing bidding, it was entitled to make "rules" regarding participation in the bids. The Supreme Court held that the charter provision allowing for "rules" must be "read in conjunction with the express command that the award shall be made to the lowest and/or best bidder. No rule enacted by the city is valid which requires an award be made to any except the lowest and/or best bidder as that phrase is interpreted in Division 2 [of the opinion] ..." 253 Ga. at 399-400.

Georgia Branch, supra, stands for the proposition that the Supreme Court of Georgia has construed the language "lowest and/or best bidder" to prohibit consideration of any factor other than the bid amount, the financial and skills qualifications of the bidder, and the quality of the bidder's past work. The defendant in the present case has argued that the *Georgia Branch* case is distinguishable, because the low-bid statute, unlike the city charter, does not refer to the "lowest and/or best bidder," and it allows the county to reject any and all bids. The latter argument, respecting the language permitting the county to reject any and all bids, is unavailing. As discussed above, this language relates to the situation wherein the county may reject all bids, but does not authorize the county to pick and choose among the bids it receives.

Defendant's other argument goes toward the concept of "responsiveness." It is defendant's contention that although the low-bid statute uses the phrase "lowest bidder," that phrase of necessity should be read to mean lowest responsive bidder to the bid specifications. Defendant is correct in its citation of *Newberry vs. Odom*, 170 Ga. 574 (1930), for this proposition. In *Newberry*, the county had advertised for bids, and had received three bids. The highest was the only one which was responsive to the specifications of the contract. Therefore, the Supreme Court held that the commissioners were within their legal rights and discretion in disregarding the two lower bids which "were not in compliance with or responsive to the specifications as advertised," in that they did not refer to any plans or specifications on file, or submit any plans or specifications, or show the kind of materials they planned to use, or how they intended to do the job. 170 Ga. at 575. This court is not at war with the principle that the county is authorized to reject any bid that is "non-responsive" in the sense that it does not meet the specifications for the project. The court notes, however, that the specifications at issue in the *Newberry* case were specifications which went to the quality of the work and how it was to be performed. Thus, *Newberry* is not in any way inconsistent with the holding of the Supreme Court in *Georgia Branch*, which acknowledged that responsiveness of a bid is governed to some extent by the quality of the work capable of being produced by the bidder. However, *Newberry* does not provide support for the proposition that a county may use non-quality related specifications as a measure of "responsiveness."

The other case cited by the defendant sheds no additional light. In *Mark Smith Construction Company, Inc. vs.*

Fulton County, 248 Ga. 694 (1982), the posture of review was as follows: Fulton County had advertised for bids for the construction of a fire station; the Mark Smith Company had submitted a bid, along with other bidders, and Mark Smith's bid was lowest; after opening the bids, the architect for the project contacted Mark Smith's references, and discovered that the reports on the quality of that contractor's performance were highly unfavorable; thereafter, the county awarded the contract to the second lowest bidder. Mark Smith sued, and the *trial court* concluded that the execution of a contract between the county and a bidder other than Mark Smith would not violate the low-bid statute; and that the injunction should be denied because the Smith Company had an adequate remedy at law. 248 Ga. at 695. On review, the Supreme Court held that the trail court had not abused its discretion in denying an injunction, since there was an adequate remedy at law. The court specifically noted that the Smith Company did not appeal the trial court's determination that award of the contract to a bidder other than itself would not violate the low-bid statute. The court noted as follows:

> Smith Company does not enumerate as error the conclusion of the trial court that the execution of a contract between the county and another bidder would not violate [the low-bid statute], ... but we point out that this case is distinguishable from *Hilton Construction Co. vs. Rockdale County Board of Education*, 245 Ga. 533 (1980), where the board rejected the lowest bid without any investigation into the qualification of the low bidder.

248 Ga. at 695. The Supreme Court's recitation of the holding of *Hilton Construction Company* is succinct, but accu-

rate. In *Hilton Construction Company*, the Board of Education was required to accept the bid of the "lowest responsible bidder." The Board rejected the plaintiff's bid, which was the lowest bid, because the plaintiff was "unknown" while the second lowest bidder was "known." No investigation into the qualifications of the plaintiff was conducted. 245 Ga. at 537. *Mark Smith* does not, as the defendant argues in its last brief in this case, stand for the proposition that the Georgia Supreme Court affirmed a holding that an award of a contract to a bidder other than the lowest bidder does not violate the low bid statute. *See* Defendant's March 4, 1985 Brief at 8. Rather, *Mark Smith*, in *dicta*, noted that perhaps the statute was not violated, since there was an investigation into the *qualifications* of the lowest bidder, unlike *Hilton Construction Company* where no investigation into the *qualifications* of the lowest bidder was conducted. The court properly acknowledged, however, that that issue was not before it. Even had it been, however, there is again nothing inconsistent between *Mark Smith* and *Hilton Construction Company* and the *Georgia Branch* case. *Georgia Branch* recognizes that the qualifications of the lowest bidder are to be taken into account in determining whether they in fact should receive the contract. No Georgia case, however, stands for the proposition that a county may engraft affirmative action requirements as a condition of "responsiveness."

The court notes, as defendant argues, that the *Georgia Branch* case did not discuss O.C.G.A. §36-10-2. It appears to the court, however, to be entirely possible that the reason the Georgia Supreme Court did not discuss the statute is that it does not apply to cities. By its terms, it refers to counties, and an opinion of the Attorney General

(Op.Atty.Gen. U80-50) confirms that the statute does not apply to cities.

For the foregoing reasons, it is the opinion of this court that the actions of Fulton County in enacting the airport program and the 1984 Minority Business Enterprise program violate Georgia's low-bid statute. The only Georgia authority which is on point, the *Manly* case and the *Georgia Branch* case, are both unanimous Supreme Court decisions which appear to indicate that the Georgia Supreme Court would conclude that a county is not authorized to engraft affirmative action requirements as a condition of the responsiveness of a bid on a county project. It is clear in Georgia law, as noted throughout the discussion above, that the legislature intends for counties and municipalities to let contracts in a manner which is designed to obtain a reasonable quality of work at the lowest possible cost. If the legislature wants to change that policy, it may do so simply by enacting a local law. *See, e.g., S.C.A. Services of Georgia, Inc. vs. Fulton County*, 238 Ga. 154 (1977). In *S.C.A. Services*, the court relied upon a Georgia statute which authorized Fulton County to contract for garbage pickup services with *"any* private individual, firm or corporation, who in the judgment of the governing authorities of Fulton County is qualified to render the required service." 238 Ga. at 155, citing Georgia Laws 1955, pp. 2244, 2245. In other words, in *S.C.A. Services*, there was a specific exemption from low bid requirements by the legislature which authorized Fulton County to consider, and award the contract, to anyone it felt qualified to perform the contract. No such action by the General Assembly is present in this case.

Having decided that Georgia law provides no authority for the county's actions, the court will examine the im-

pact which that decision has on the rest of the issues in the case.

2. *Validity of the 1984 Resolution.*

a) Standing and Ripeness

The defendant has argued that the plaintiff does not have standing, and that the issue over the 1984 Resolution is not ripe for judicial review. Because standing is a constitutional requirement going to this court's jurisdiction to hear this case, the court considers it first. *See, e.g., Warth vs. Seldin*, 422 U.S. 490, 499-500 (1975). The defendant asserts that because the plaintiff has not bid on any Fulton County contracts governed by the 1984 Resolution, plaintiff does not have a sufficient "stake in the outcome" of this litigation to satisfy the standing requirements. The standard for whether a party has standing is whether the person has a personal stake in the outcome, with a fairly traceable causal connection between the claimed injury and the challenged conduct. The causal connection should be a "but for" standard, such that absent the challenged action, the injury would not have been received, or be threatened. *Duke Power Co. vs. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 (1978). The defendant correctly points out that a person cannot have standing if the asserted harm is merely a generalized grievance shared by a large number of citizens in substantially equal measure. *Id.*, at 80.

The court concludes that the injury alleged by the plaintiff in this case is sufficient to satisfy the standing requirements. It is plaintiff's allegation that the existence of the MBE requirements causes a loss of profits and contribution to overhead. The facts reveal that because the plaintiff is an extremely large national corporation, on most projects

it does not need to subcontract any of the work. Despite this fact, the 1984 Resolution would require them to subcontract at least part of their work in order to do business with Fulton County, which would, in turn, decrease the gross income received and presumably profits and contribution to overhead. For that reason, it is the plaintiff's assertion, undisputed by the defendant, that it will not bid on Fulton County projects at the present time. Fulton County's only argument in response to the showing made by the plaintiff is that the plaintiff has contracted with the state of Georgia on contracts that require MBE participation. However, the record also reveals that those state contracts carry a substantially lower percentage of required MBE participation, ranging from three to ten percent, while Fulton County requires twenty percent. Therefore, no conclusive inference can be drawn from plaintiff's activities as regards state contracting. The present injury, for standing purposes, however, is apparent to the court.

For the foregoing reasons, the court concludes that the plaintiff has alleged "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions...." *Jenkins vs. McKeithen*, 395 U.S. 411, 423 (citations omitted) (plurality opinion).

The court would further note that plaintiff has standing in addition on the grounds that, were they to submit a bid, the twenty percent requirement would be applied to them. Since they are challenging the constitutional validity of the application of that requirement to them, there is a sufficient threatened injury to meet the standing requirements. Other courts have upheld standing for plaintiffs identical to

the ones at bar. *Contractors Association of Eastern Pennsylvania vs. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied sub nom Contractors Association vs. Hodgson*, 404 U.S. 854 (1971); *Wright Farms Construction Co. vs. Kreps*, 444 F. Supp. 1023 (D.Vt. 1977).

Defendant's argument, alternatively, could be construed as a contention that there is no ripe "actual controversy" under the Declaratory Judgment Act, 28 USC §2201. The fact that this plaintiff has not bid on a county project subject to the 1984 Resolution in the past does not, however, mean there is no actual controversy. To determine whether there is an actual controversy, the test is whether

> ...there is substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Maryland Casualty Co. vs. Pacific Coal and Oil Co., 312 U.S. 270, 273 (1941); *Lake Carriers' Association vs. Mac Mullan*, 406 U.S. 498, 506 (1972). The controversy may not be hypothetical or conjectural; rather, "... it must be real and immediate, and create a definite, rather than speculative threat of future injury." *Emory vs. Peeler*, 756 F.2d 1547, 1552 (11th Cir. 1985), *citing City of Los Angeles vs. Lyons*, 461 U.S. 95 (1983). In *Lyons*, the Court held that there was no actual controversy sufficient for a declaratory judgment that the use of the chokehold by police officers in making arrests was unconstitutional. The "injury" was remote because the Court refused to assume the plaintiffs would break the law and again be arrested. 461 U.S. at 467.

In the case at bar, contrary to the facts of *Lyons*, the evidence shows that everyone who engages in the perfectly

legal conduct of bidding on county projects must comply with the 1984 Resolution. The Resolution is actively enforced, and replaced a prior resolution which was also actively enforced. In *Doe vs. Bolton*, 410 U.S. 179 (1973), the Court held that an active controversy over the constitutional validity of a statute was present where the evidence showed that a prior similar statute had been actively enforced, and there was no reason to believe its successor would not be. 410 U.S. at 188. *See also Steffel vs. Thompson*, 415 U.S. 452 (1974) (case sufficiently ripe when plaintiff had been threatened with arrest under allegedly unconstitutional statute).

Doe and *Steffel* stand for the proposition that a plaintiff need not expose himself to the allegedly unconstitutional conduct in order for the controversy to be ripe. Rather, a controversy is justiciable upon a factual showing that the controversy creates a "definite threat of future injury." *Emory, supra*, 756 F.2d at 1552. The claim recited above presents a concrete, present controversy between the parties. The threat of future injury is definite – if plaintiffs submit a contract bid to the county, they will be compelled to comply with the Resolution. The court concludes that the controversy is sufficiently ripe to make declaratory relief available. The evidence establishes that if this claim were dismissed as unripe, the suit would be back before the court, presenting exactly the same issues, as soon as the defendant told the plaintiff that to receive a particular contract, plaintiff had to make a good faith effort to meet the MBE goals. Thus, the controversy is not hypothetical or conjectural. *Emory, supra*, at 1552. The court is of the opinion, however, that a challenge based on a loss of a competitive position vis-a-vis other non-minority contractors would not present a ripe controversy.

b) State Law Claims.

The plaintiff has alleged that the 1984 Resolution violates two provisions of Georgia law: first, the equal protection clause of the Georgia Constitution, and second, Georgia's low-bid statute found at O.C.G.A. §36-10 2. Because the court concludes that O.C.G.A. §36-10-2 is violated, it is unnecessary to decide the state constitutional issue. *Georgia Branch,* 253 Ga. at 397 (1984). The parties' cross-motions on the state constitutional issue are DENIED. The plaintiffs' motion for summary judgment on the low-bid statute as it relates to the 1984 Resolution is GRANTED; defendant's cross-motion is DENIED. There being no just reason for delay of the injunctive relief on this count of the complaint, the defendant Fulton County is hereby ENJOINED from enforcing the provisions of the Resolution adopted on June 6, 1984 entitled "A Resolution to Re-Enact a Minority Business Enterprise Affirmative Action Program." This discussion by the court disposes of Count VII of the third amended complaint.

c) Federal Claims.

Counts VI and VIII of the third amended complaint allege that the 1984 Resolution violates Title VI of the Civil Rights Act (42 USC §2000d, *et seq.*) and is repugnant to the equal protection clause of the United States Constitution. The parties have cross-moved for summary judgment on these issues.

The validity under federal law of a voluntarily-enacted affirmative action plan which permits race-conscious relief turns on application of the standards set out in *South Florida Chapter of the Associated General Contractors of America vs. Metropolitan Dade County, Florida,* 723 F.2d 846, 851 (11th Cir.

1984). In *South Florida Chapter, supra,* the Eleventh Circuit held as follows:

> An affirmative action plan enacted by a local government body is valid if [the court insures] (1) that the governmental body have the authority to pass such legislation; (2) that adequate findings have been made to insure that the governmental body is *remedying* the present effects of past discrimination rather than advancing one racial or ethnic group's interest over another; and (3) that the use of such classifications extend[s] no further than the established need of remedying the effects of past discrimination.

723 F.2d at 851-52 (emphasis in original). Whether the body had the authority to enact the provision is a question of state law. 723 F.2d at 852. As noted above, it is the determination of this court that Fulton County has no authority under state law to enact the resolution at issue. Therefore, the court's inquiry ends. The 1984 Resolution is therefore invalid, and as an alternate holding to the state law issue, the court concludes that plaintiff's motion for summary judgment on Counts VI and VIII is GRANTED and defendant's cross-motion is DENIED.

3. *Validity of the Airport Program.*

a) State Law Claims

Plaintiffs' state claims respecting the airport program enacted in 1983 are twofold: first, plaintiff alleges that the county breached its promise, contained in the invitation to bid, to award the contract to the lowest responsive bidder; second, plaintiff contends that the county has violated the state's low-bid statute, found at O.C.G.A. §36-10-2. With re-

spect to the breach of promise claim, plaintiff alleges that the county had promised to award the contract to the contractor who either met, or made a good faith effort, to meet the MBE goals. It is plaintiff's contention that it did make a good faith effort to meet the MBE goals, and that the county's determination that it did not is arbitrary and capricious. The county, which has moved for summary judgment on this point, argues that its determination of the lack of good faith was not arbitrary or capricious. Plaintiff, opposing the county's motion for summary judgment on this point, argues that there are disputed questions of fact. If the plaintiff's witness, Mr. Villadsen, is to be believed, he followed every suggestion made by the county as to how he could increase his minority participation on this contract, and he was unable to do so. He was not told that there was a County Commission meeting the day after he reported this to Clarence Reid, and therefore did not know that he should attend and make an effort to prove to the commissioners that he had made a good faith effort. Additionally, if Mr. Villadsen is believed, Clarence Reid told him that it was Clarence Reid's opinion that Groves had made a good faith effort to comply, in contradiction to what Reid later told the Commission. On the other hand, if Clarence Reid is believed, he told Villadsen of the pending county meeting, and the necessity to act with speed; he told Villadsen that there were other avenues he could explore; and Villadsen threatened to lay off minority employees in retaliation for the county's insistence on its percentage goals. The court concludes that these disputed questions of fact make the matter unsuited for summary adjudication.

The court acknowledges defendant's argument that there can be no enforceable contract with a county in the state of Georgia unless the promise is contained in the min-

utes of the county's meetings. *See, e.g., Oqletree vs. Chester*, 682 F.2d 1366, 1370 (11th Cir. 1982) (applying Georgia law); *see also Lester Witt & Company vs. Rabun County*, 245 Ga. 382, 384 (1980); O.C.G.A. §36-10-1. However, the county has failed to consider the fact that the meeting in July 1982, at which Groves was conditionally awarded this contract, pending good faith efforts to increase their minority participation, is recorded on the county's minutes. First Alice Smith Affidavit, ¶5, Exhibit F. Therefore, the county's motion for summary judgment on this ground is DENIED.[3]

With respect to plaintiffs' claims under the state's low-bid statute, as noted above, the court has concluded that, under Georgia law, the defendant's actions would violate O.C.G.A. §36-10-2. However, defendant has argued that even if its actions do violate Georgia's low-bid statute, for purposes of considering the *airport program*, that statute is preempted by the federal regulations with which the county

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[3] The court acknowledges the county's request for summary judgment that on this count plaintiff could not recover lost profits and overhead. However, the county has cited absolutely no Georgia authority for the proposition that profits and overhead are not recoverable by a disappointed bidder, if the county breaches its promise. The cases cited by the defendant for this proposition both deal with bidders for contracts to be let by the United States, and state the rule in Court of Claims cases that lost profits and overhead are not recoverable. *Keco Industries Inc. vs. United States*, 428 F.2d 1233 (Ct.Cl. 1970); *Collins & Company vs. Claytor* 476 F. Supp. 407 (N.D .Ga. 1979) Whatever the rule is with respect to claims against the United States, these cases have no application to the case wherein it was Fulton County who solicited the bids. That would be controlled by Georgia law, and the defendant has cited none. The motion for summary judgment on this point is DENIED without prejudice, and defendant may renew it within thirty (30) days from the date of receipt of this order if it so desires.

was forced to comply in order to obtain funds for this federal project. Plaintiff has conceded that, as regards the airport project, even if the defendant's actions violated the low-bid statute, that statute would be preempted.

As plaintiffs point out, in order for federal regulations to preempt a state statute, the regulations must be rooted in a congressional delegation of authority and be enacted pursuant to the procedures mandated by Congress. In *Chrysler Corporation vs. Brown*, 441 U.S. 281, 295-308 (1979), the Court held that properly promulgated, substantive agency regulations have the "force and effect" of law and preempt conflicting state laws. *Chrysler*, 441 U.S. at 295-96. For regulations to have the "force and effect" of law, the Court continued, the regulations must flow from a congressional delegation of authority and comply with any procedural requirements imposed by Congress. *Id.* at 301-03. Overall, the reviewing court must reasonably be able to conclude that the issued regulations were contemplated in the grant of rule-making authority by Congress. *Id.* at 308.

The question of the validity of the DOT regulations with which Fulton County purportedly complied in enacting the airport program is therefore pertinent to this case in determining the preemption issue. To explain, the parties' arguments flow as follows. Plaintiffs contend that the airport program violates the Georgia Constitution,[4] the

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[4] The court notes that Count III of the third amended complaint contains a claim under the due process clause of the Georgia Constitution. Both parties' cross-motions for summary judgment refer to "Count III" in the captions to their cross-motions; however, neither party discusses due process concepts at all in their briefs, and no authority is provided as to why either side should be granted summary judgment on due process claims. The court acknowledges that it is possible that there is a

Georgia low-bid statute, the equal protection clause of the Federal Constitution, and Title VI (42 USC §2000d). The defendant has responded to plaintiffs' contentions by arguing that the program was enacted in compliance with federal regulations. From this, defendant draws two inferences: first, plaintiffs' state law claims are preempted; and second, plaintiffs' federal claims fail because no intent to discriminate motivated the defendant to enact the program. In response, the plaintiff alleges that the DOT regulations are not valid, so that preemption does not apply to the state claims. Without the DOT regulations to support the program, plaintiff further argues, the program constitutes intentional

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typographical error in the main complaint, such that plaintiff intended to assert a claim under the equal protection clause of the Georgia Constitution. The complaint does not refer to the records "due process" or "equal protection;" rather, the complaint refers to Article I, Section 1, Paragraph 1, of the Georgia Constitution. That is the due process provision; however, Article I, Section 1, Paragraph 2, is the equal protection provision of the Georgia Constitution, which the parties have discussed. To the extent that plaintiffs attempt to state a claim under the equal protection clause of the Georgia Constitution, the court notes that as a matter of Georgia law, Georgia's Constitution incorporates by reference all of the standards in cases that discuss the federal equal protection clause. *McDaniel vs. Thomas*, 248 Ga. 633, 638 (1981), citing *State of Georgia vs. Sanks*, 225 Ga. 88 (1969). To the extent that plaintiff intended to assert a claim for equal protection violations under the Georgia Constitution, the issue shall be discussed below. Plaintiff may have ten (10) days from the date of receipt of this order to amend the complaint to refer to the equal protection clause of the Georgia Constitution, if that is what plaintiff intended. If, however, plaintiff intended what it said, and meant to state a claim under the due process clause of the Georgia Constitution, then both motions for summary judgment are DENIED, on the grounds that there is no argument or authority in support of either motion.

race-conscious discrimination which does not satisfy the test set out in *South Florida Chapter*, discussed above.

There is no dispute in this case that the airport program was enacted solely to comply with federal regulations. These regulations, discussed above, require recipients of federal funds for airport renovation to enact a minority business plan for the project. There is no evidence of record, or argument by plaintiffs, that the defendant's program failed to comply with the regulations in any respect. Thus, in order to determine the state law issue raised by this case, the court will have to determine the validity of the federal regulations. If they are not valid, they cannot preempt the low-bid statute. If, however, the regulations are valid, they preempt the low-bid statute. Having determined what the issue is, the court concludes that it will defer deciding it. For the reasons discussed below, the court believes the Federal Department of Transportation should be joined in this action as a defendant, pursuant to Fed. R. Civ. P. 19(a). Therefore, in the interest of having a full record on which to decide the question of the validity of the regulations, the court will defer consideration of the cross-motions for summary judgment on the state law claims relating to the airport program.

b) The Federal Claims

The amended complaint asserts two federal claims as regards the airport program: First, the complaint alleges that the program violates Title VI of the Civil Rights Act, 42 USC §2000d, and second, the complaint alleges that the program violates the equal protection clause of the United States Constitution. To redress these alleged wrongs, plain-

tiff seeks only money damages. The parties have cross-moved for summary judgment on these two counts.

The defendant had to have known, in enacting the airport program, that it was discriminating on the basis of race. The question is whether this is authorized, constitutionally permissible discrimination, since the program was enacted to comply with a federal regulation requiring it. The defendant had a choice of seeking or not seeking federal funding for the project. By choosing to seek such funding, the defendant has cast its lot with the validity of the Federal Department of Transportation regulations. To the extent that the regulations embody a valid affirmative action program, the defendant is not liable. However, if the regulations are not valid, the defendant would be liable under *South Florida Chapter. See also Paradise vs. Prescott*, ___ F.2d ___, Nos. 84-7053, 84-7564 (11th Cir., August 12, 1985), and *Contractors Association vs. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

Pragmatic concerns with the impact of resolution of this issue have led the court to raise the issue of compulsory joinder of the Federal Department of Transportation *sua sponte*. *See Provident Tradesmens Bank & Trust Co. vs. Patterson*, 390 U.S. 102, 111 (1968). If plaintiffs obtain the monetary relief they seek from Fulton County, because this court determines that the regulations are invalid, and therefore plaintiffs also obtain a declaration that such programs violate the low-bid statute, the defendant will be in an intolerable position. Having been held liable for complying with the federal regulations once, Fulton County would naturally be reluctant to comply with those regulations again. However, if the Federal DOT is not made a party to this lawsuit, they will persist in demanding compliance

with the regulations.[5] Thus, Fulton County would either have to forego obtaining federal funding for important public works projects, or be obligated to pay damages if they do.

It is this dilemma which compels the court to turn to Rule 19(a) of the *Federal Rules of Civil Procedure*, which provides, in pertinent part, as follows:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if ... (2) he claims an interest relating to the subject of the action and he is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

This rule is to be applied by looking to the pragmatic, practical implications of the litigation. *Challenge Homes, Inc. vs. Greater Naples Care Center, Inc.*, 669 F.2d 667, 669 (11th Cir. 1982). Thus, even if DOT would not be bound by the court's judgment in this case, it should be joined if that judgment may practically impact upon DOT. *Id.* at 670.

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[5] Despite these regulations having been determined to be invalid in *Central Alabama Paving, Inc. vs. James*, 499 F. Supp. 629 (M.D. Ala. 1980), the DOT has continued to enforce them, and obtained a judgment that they are valid in *M. C. West, Inc. vs. Lewis*, 522 F. Supp. 338 (M.D.Tenn. 1981).

Applying the Rule 19(a) criteria, the court determines that the DOT does have an interest in the subject matter of this litigation which would be affected by resolution of this case. A judgment for plaintiffs would constitute precedential authority that DOT's substantive regulations are invalid. That could have far-reaching implications for the DOT. In *Boles vs. Greeneville Housing Authority*, 468 F.2d 476 (6th Cir. 1972), Judge Tuttle of this circuit sitting by designation held that the Department of Housing and Urban Development was a necessary party under Rule 19(a). The plaintiffs in *Boles* sued an urban renewal project, alleging that the plan for the project, which HUD had approved, violated HUD regulations and the statute under which they were promulgated.

> In order to grant the relief sought by the [plaintiffs] this court would be compelled to hold in effect that ... [HUD] misconceived its function and prerogatives under the Urban Renewal Act. To make such a determination without joining HUD is to deprive it of the right to defend the integrity of its administrative decisions in these areas which so intimately affect its policies and procedures.

468 F.2d at 479. Therefore, the court concluded that HUD was "necessary" under Rule 19(a)(2)(i). *See Guesnon vs. McHenry*, 539 F.2d 1075, 1078 (5th Cir. 1976) (citing *Boles* with approval). *See also McCowen vs. Jamieson*, 724 F.2d 1421, 1424 (9th Cir. 1984) (Secretary of Agriculture "necessary" under Rule 19(a)(2)(i) where plaintiff challenges actions of a defendant who merely followed Secretary's regulations).

In addition to Rule 19(a)(2)(i), the court concludes that the DOT is necessary under Rule 19(a)(2)(ii). As noted above, the defendant in this action stands a substantial risk of incurring inconsistent obligations if DOT is not made a defendant. That is also a ground for Rule 19 joinder. *See Pegues vs. Mississippi State Employment Service*, 57 F.R.D. 102 (N.D.Miss. 1972) (where federal regulations inconsistent within junctive relief sought by plaintiff, federal agency a necessary party).

In *Young vs. Pierce*, 544 F. Supp. 1010 (E.D.Tx. 1982), the court held that HUD was a proper defendant to an action under Title VI alleging that the agency was permitting discrimination in a federally funded housing project. The court noted:

> To the extent a plaintiff asserts that the federal agency is violating the terms of the federal statute ... then the action is properly brought against the agency. In such a circumstance, the agency is a partner in discrimination, and may be held responsible for this complicity.

544 F. Supp. at 1015 (cites omitted). Thus, to the extent that plaintiffs may prevail on their constitutional and Title VI claims as to Fulton County, DOT *may* also be liable. *See Central Alabama Paving, supra*, in which the Federal DOT was brought in via a third-party complaint filed by the defendant.

The court is not deciding, by any means, any questions of the potential liability of DOT in the case at bar. Rather, the court merely observes that under Rule 19, DOT is a necessary party to the litigation, and should be joined. The court would benefit from having DOT's views on the valid-

ity of its regulations, since Fulton County has expressly disclaimed responsibility for defending them. Moreover, this is not solely an action for money damages, since the discussion regarding the low-bid statute and preemption has wide-ranging future implications due to its precedential effect. To grant the relief plaintiffs request under state law, the court would have to declare the regulations invalid. Therefore, pursuant to Rule 19(a), the court DIRECTS that the Secretary of Transportation be joined in this action as a defendant. Fulton County, as the party most gravely impacted by DOT's absence, is DIRECTED to accomplish service of process within twenty days from the date of receipt of this order. In lieu of a complaint, Fulton County may serve a copy of this order with the summons. Consideration of the cross-motions for summary judgment on Counts II through V is DEFERRED.

The following schedule will control progress of the next phase of this litigation:

1) DOT to be served by Fulton County within twenty (20) days from the date of receipt of this order.

2) The plaintiffs and Fulton County may serve any complaints they intend to press against DOT not later than November 1, 1985.

3) The DOT's time for answering or otherwise pleading will be controlled by the provisions of the *Federal Rules of Civil Procedure*.

4) Not later than December 1, 1985, the plaintiffs, Fulton County, and the DOT shall meet pursuant to LR 235-2, and 235-3, and file a settlement

certificate and preliminary statement. The parties shall additionally comply with LR 201-1.

5) A conference is hereby set for the 7th day of January, 1986, at 10:00 a.m. , in chambers. The court would like to discuss at that time a discovery schedule, and briefing schedule on the issues remaining in the case. Should the parties desire, the court will also discuss settlement of the remaining issues.

C. *CONCLUSION.*

Count-by-count, this order holds as follows. On Count I, defendant's motion for summary judgment is DENIED. On Counts II through V, consideration of the parties' cross-motions for summary judgment is DEFERRED pending joinder of the DOT and further briefing. On Counts VI, VII, and VIII, plaintiffs' motion for summary judgment is GRANTED, and defendant's cross-motion for summary judgment is DENIED the defendant is hereby ENJOINED and RESTRAINED from enforcing the 1984 MBE Resolution.

IT IS SO ORDERED this 30th day of September, 1985.

/s/ J. OWEN FORRESTER

UNITED STATES DISTRICT JUDGE

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

S.J. GROVES & SONS COMPANY	:	
and JASPER CONSTRUCTION	:	
COMPANY,	:	
Plaintiffs,	:	
vs.	:	CIVIL ACTION
	:	NO. C82-1895A
FULTON COUNTY, et al.,	:	
Defendants.	:	

ORDER

This action is before the court on cross motions for summary judgment by the plaintiffs and defendant Fulton County on counts II through V of the plaintiffs' complaint and on the federal defendants' motion to dismiss the county's cross claim for damages. For the reasons set out below the plaintiffs' motion for summary judgment is GRANTED IN PART and DENIED IN PART, the county's motion for summary judgment is DENIED, and the federal defendants' motion to dismiss the cross claim is GRANTED.

I. CROSS MOTIONS FOR SUMMARY JUDGMENT ON COUNTS II THROUGH V.

Counts II through V allege that the county's rejection of the plaintiffs' bid on the Fulton County Airport-Brown Field project violated Georgia's low bid statute, the equal protection clause of the Georgia Constitution, Title VI of

the Civil Rights Act of 1964, and the equal protection clause of the fourteenth amendment. In its September 30, 1985 Order the court, *inter alia*, deferred these cross motions pending resolution of the validity of the federal defendants' MBE regulation. Reliance on a valid federal regulation would have provided a defense to the plaintiffs' claims against the county in counts II through V — a valid federal regulation would preempt the state low bid statute and the state constitution and would be consistent with Title VI and the fourteenth amendment. However, in its March 30, 1987 order the court held that the federal defendants' MBE regulation violated the equal protection component of the fifth amendment. The question to be decided on these cross motions is whether any defenses to the plaintiffs' claims in counts II through V remain available to the county.

A. *Count II — Georgia Low Bid Statute.*

The county advances two arguments in support of its contention that the state low bid statute should not be applied in this case.[1] First, the county argues that the federal regulation, even if invalid, preempts the state statute. As the court previously noted, however, the regulation's validity is critical to the preemption argument: "If [the regulation is] not valid, [it] cannot preempt the low bid

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[1]The court previously discussed at length the county's argument that its MBE requirement did not violate the low bid statute at all because the county had the authority to enact race-conscious contracting requirements. *See* September 30, 1985 Order, at 12-25. The court concluded that "Georgia law provides no authority for the county's actions," *id.* at 25, and that the airport program's MBE requirements violated the low bid statute unless that statute had been preempted by federal law.

statute." *Id.* at 36. Not one of the cases cited by the county is to the contrary; all of the cases cited dealt with local governments' reliance on *valid* federal regulations.

Second, the county argues that the state statute is preempted by the fourteenth amendment; that is, the county argues that the equal protection clause not only permitted but affirmatively required the county to impose its MBE program. However, even assuming that the fourteenth amendment may sometimes require affirmative action and thereby preempt state low bid statutes, this is not such a case. By the county's own admission, the fourteenth amendment requires affirmative action only to remedy "identified effects of discrimination *by a public body*." Brief in Support of Fulton County's Motion, at 11 (emphasis supplied). No prior discrimination by Fulton County in its public contracting has been established here. While the county vigorously contends that MBEs suffer from the effects of "past discrimination," the county has pointed to no evidence of such past discrimination by Fulton County.

Conscious of the deficiency, the county relies on the Eleventh Circuit's decision in *South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County*, 723 F.2d 846 (11th Cir. 1984), in which the court upheld Dade County's MBE contracting program against an equal protection challenge by non-minority contractors. As the county emphasizes, "there was no finding by the district court and the circuit court that the Dade County government had engaged in discriminatory practices." Brief of Defendant Fulton County in support of its Cross Motion for Summary Judgment on Counts VI, VII and VIII (filed March 4,

1985), at 18. The county's implied argument is that the lack of such a finding in *South Florida Chapter* obviates the need for such a finding in this case.

The county's reliance on *South Florida Chapter* is misplaced for two reasons. First, the Eleventh Circuit in *South Florida Chapter* did not hold that Dade County's affirmative action program was constitutionally required in spite of state law requiring acceptance of the low bid; the court merely upheld the affirmative action program as a constitutionally permissible exercise of the county's authority under state law that allowed the county to waive competitive bidding when doing so was in the county's best interest. *See* 723 F.2d at 850. In short, if a black contractor had sued Dade County or Fulton County on the facts presented in *South Florida Chapter* and in this case, he would not prevail because he would not have established intentional discrimination by the counties. *See Washington v. Davis*, 426 U.S. 229, 239 (1976). If there has been no violation of the fourteenth amendment, the fourteenth amendment does not mandate affirmative action and therefore does not preempt state law to the contrary. Second, much of the evidence relied on by the Eleventh Circuit in *South Florida Chapter* tends to establish only societal discrimination, "that is, discrimination not traceable to [Dade County's] own actions." *Wygant v. Jackson Board of Education*, 106 S.Ct. 1842, 1854 (1986) (O'Connor, J., concurring). For example, the court noted the district court's findings that "past discriminatory practices had impeded the development of black businesses" and that "there had been identified discrimination against Dade County black contractors at some point prior to the county's present affirmative action pro-

gram," while at the same time acknowledging that "the present county government had not engaged in discriminatory practices." 723 F.2d at 853. It is doubtful that such evidence, which explicitly lacks "some showing of prior discrimination by the governmental unit involved," *Wygant*, 106 S.Ct. at 1847, provides sufficient justification for racial classifications (Opinion of Powell, J.). As Justice Powell wrote for the plurality in *Wygant*:

> No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over-expansive.

106 S.Ct. at 1848 (original emphasis).

B. *Counts III, IV and V — State Equal Protection, Title VI, and Federal Equal Protection.*

As the court noted in its September 30, 1985 Order, the conclusion that the county's MBE program violated the state low bid statute makes it unnecessary to decide the state constitutional issue. *See Georgia Branch, Associated General Contractors of America, Inc. v. City of Atlanta*, 253 Ga. 397, 398 (1984). The parties' cross motions on that issue were denied in the previous order and are again denied.

The county argues that it cannot have violated the state and federal constitutions or Title VI because it lacked a discriminatory intent. The court previously has rejected the argument, noting that the "defendant had to have known, in enacting the airport program, that it was discriminating on the basis of race." September 30, 1985

Order, at 37. The court explicitly held in that order that if the DOT regulation was not valid the defendant would be liable under *South Florida Chapter* on the plaintiffs' equal protection and Title VI claims. *Id.* However, as the county correctly points out, the plaintiffs are entitled only to the cessation of any discriminatory activity, not to any monetary relief, on their equal protection and Title VII claims. *Drayden v. Needville Independent School District*, 642 F.2d 129, 133 (5th Cir. 1981).

C. *Other Defenses.*

The county asserts three other defenses to the plaintiffs' claims, none of which have merit. First, the county argues, relying on *Fahey v. Mallonee*, 332 U.S. 245 (1946), that the plaintiffs are estopped from challenging DOT's MBE regulation because they have received benefits under that regulation. The estoppel argument is inapplicable because the plaintiffs have not received any benefits under the particular grant at issue (the Fulton County Airport-Brown Field project), nor under the authorizing statute at issue (the Airport and Airway Development Act of 1970). Moreover, any benefits received by the plaintiffs on other projects under other statutes subject to the MBE regulation are not of the same nature as the benefits received in *Fahey*, where a savings and loan challenged the constitutionality of the act under which it was created. In fact, it seems incorrect to speak of any but minority-owned contractors as beneficiaries of the MBE regulation. The regulation was not designed to nor does it benefit in any way those non-minority contractors who perform contracts subject to its provisions.

Second, the county argues that the plaintiffs have waived their right to object to the MBE regulation by submitting a bid on the Fulton County Airport project without objecting to the MBE requirements. "[A] waiver of constitutional rights in any context must, at the very *least*, be clear." *Fuentes v. Shevin*, 407 U.S. 67, 95 (1971) (original emphasis). The "waiver" asserted here is not at all clear and the county's argument must be rejected.

Finally, the county argues that the court's decision holding the DOT MBE regulation unconstitutional should not be retroactively applied against the county. However, the court cannot agree with the county that its decision establishes "a new principle of law." *Chevron Oil Company v. Huson*, 404 U.S. 97, 106 (1972). The decision does not overrule "clear past precedent on which litigants may have relied," nor does it decide "an issue of first impression whose resolution was not clearly foreshadowed." *Id.* The DOT's MBE regulation had been invalidated by one court, *Central Alabama Paving, Inc. v. James*, 499 F. Supp. 629 (M.D.Ala. 1980), and upheld by another, *M. C. West, Inc. v. Lewis*, 522 F. Supp. 338 (M.D.Tenn. 1981). Moreover, many of the court's reasons for invalidating the regulation have been basic principles of affirmative action law since *University of California Regents v. Bakke*, 438 U.S. 265 (1978), at the latest.[2]

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[2]The county's non-retroactivity argument would also fail the second and third prongs of the analysis outlined in *Chevron Oil Company* if the court's decision had announced a new principle. "Retroactive" application would not retard the operation of the decision and would not produce "substantial inequitable results." *Id.* at 107. The fact that the county had imposed its own MBE requirement for public contracting prior to its acquiescence to the DOT's requirement and that the

II. FEDERAL DEFENDANTS' MOTION TO DISMISS FULTON COUNTY'S CROSS CLAIM.

When the federal defendants were joined as parties to this action Fulton County asserted a cross claim against the federal defendants seeking money damages for any amounts the county might be ordered to pay the plaintiffs in this lawsuit. This court has no jurisdiction over that claim because of the provisions of the Tucker Act, 28 USC §1346(a)(2), which provides in pertinent part,

> The district courts shall have original jurisdiction, concurrent with the court of claims, of: ... any other civil action or claim against the United States, not exceeding $10,000 in amount.

The above-quoted language by implication "renders exclusive the Court of Claims' jurisdiction over claims against the United States exceeding" $10,000. *Keller v. Merit Systems Protection Board*, 679 F.2d 220, 222 (11th Cir. 1982). Fulton County's argument that this court's order requiring the joinder of the federal defendants supersedes any jurisdictional objections is meritless. First, this court does not have the authority, even if it sought to do so, to expand its jurisdiction *sua sponte*. Second, the order in question merely required the joinder of the federal defendants; it did not require the assertion by the county of a cross claim against the federal defendants. Pursuant to 28 USC §1631, the county's cross claim against

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county's acceptance of federal funds, and the MBE requirements attached as a condition of receipt, was the county's voluntary choice takes much of the force out of the county's argument that retroactive application of the court's decision would be inequitable.

the federal defendants will be transferred to the Court of Claims.

III. CONCLUSION.

In summary, the plaintiffs' motion for summary judgment on counts II through V is GRANTED as to counts II, IV and V but DENIED as to count III. Defendant Fulton County's motion for summary judgment on the same counts is DENIED as to all counts. The federal defendants' motion to dismiss the county's cross claim for damages is GRANTED and that claim is TRANSFERRED to the court of claims pursuant to 28 USC §1631.

SO ORDERED, this 1st day of April, 1987.

/s/J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

S.J. GROVES & SONS COMPANY, and JASPER CONSTRUCTION COMPANY, Plaintiffs,	:	
vs.	:	CIVIL ACTION NO. C82-1895A
FULTON COUNTY, et al., Defendants.	:	

ORDER

This action is before the court on the plaintiffs' request for injunctive relief against the federal defendants and on the parties' supplemental briefs addressing the applicability of the Eleventh Circuit's decision in *H. K. Porter Company, Inc. v. Metropolitan Dade County*, 825 F.2d 324 (11th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3462 (U.S. January 12, 1988) (No. 87-1001).[1] In its previous order granting the plaintiffs' motion for summary judgment and denying the federal defendants' motion for summary judgment, the court held that Subpart C of the Department of Transportation's MBE regulation, 49 C.F.R. §§23.01, *et seq.* (hereinafter "Subpart C" or "the regulation"), is unconstitutional because it violates the fifth amendment's equal protection

[1] On January 19, 1988 the Supreme Court invited the Solicitor General to file briefs in the case expressing the views of the United States. 56 U.S.L.W. 3482.

component. The plaintiffs now ask this court to enter an injunction permanently prohibiting the application and enforcement of Subpart C against the plaintiffs. The defendants urge the court to reconsider its previous order in light of *H. K. Porter Company*. The court will decline both requests, for the reasons discussed below.

Plaintiffs' Request for Injunctive Relief

The circumstances under which permanent injunctive relief is appropriate are well established:

> To be entitled to permanent injunctive relief from a constitutional violation, a plaintiff must first establish the fact of the violation. He must then demonstrate the presence of two elements: continuing irreparable injury if the injunction does not issue, and the lack of an adequate remedy at law. If the plaintiff makes such a showing, the court may grant injunctive relief, but the relief must be no broader than necessary to remedy the constitutional violation.

Newman v. State of Alabama, 683 F.2d 1312, 1319 (11th Cir. 1982) (citations omitted). In this case, the court concludes that the plaintiffs have not established their entitlement to injunctive relief.

As a preliminary matter, the court notes that the federal defendants' opposition to the plaintiffs' request for injunctive relief mischaracterizes the scope of the court's previous order. According to the federal defendants, the court found the MBE regulation unconstitutional only as applied to the Airport and Airway Development Act of 1970, now found at 49 USC §§2201, *et seq*. Though the MBE regulation, particularly Subpart C, was applied in

this case via the AADA, Counts IX and X of the plaintiffs' complaint assert a facial challenge to the constitutionality of the regulation. The court's holding that the regulation is not justified by a compelling governmental interest and that it is not narrowly tailored to further any such interest applies to *any* project where an MBE requirement is imposed pursuant to Subpart C. Of course, to the extent that an MBE requirement is imposed pursuant to Subpart D, as for highway and mass transit projects for which funds are appropriated under the Surface Transportation Assistance Act of 1982, Pub.L. 97-424, 96 Stat. 2097, 2100 (1983), or the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub.L. 100-17 (April 7, 1987), the court's previous order does not govern. *Compare H. K. Porter Company, Inc. v. Metropolitan Dade County*, 825 F.2d 324 (11th Cir. 1987).

Injunctive relief is unwarranted because the plaintiffs' injury is not likely continuing. An initial question is whether the court has power to issue a nationwide injunction in appropriate cases. By virtue of its personal jurisdiction over the defendants in this case, it is clear that the court does have such power. *See Waffenschmidt v. MacKay*, 763 F.2d 711, 716 (5th Cir. 1985).

A second question is whether the court may include other persons or entities within the injunction's protection or must limit it to the plaintiffs. The answer to this question is not without doubt.[2] Controlling cases ap-

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[2] Some cases limit the scope of injunctive relief to the particular plaintiff before the court. *See Ameron, Inc. v. U.S. Army Corps of Engineers*, 787 F.2d 875, 888 (3d Cir. 1986) (in the absence of a certified class action, plaintiff entitled only to relief for itself; district court's entry of declaratory judgment of constitutionality serves only as prece-

prove injunctive relief that extends beyond the particular plaintiff. *See Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1136 (11th Cir. 1984) ("injunctive relief may benefit individuals not party to the action, and ... classwide injunctive relief may be appropriate in an individual action"); *Professional Association of College Educators v. El Paso County Community College District*, 730 F.2d 258, 274 (5th Cir. 1984) (an injunction "is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit — even if it is not a class action — if such breadth is necessary to give prevailing parties the relief to which they are entitled"); *Meyer v. Brown and Root Construction Company*, 661 F.2d 369, 374 (5th Cir. 1981) ("Injunctive relief which benefits non-parties may sometimes be proper even where the suit is not brought as a Rule 23 class action"). *See also Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981) (district court permanently enjoined enforcement of central provisions of Surface Mining Control and Reclamation Act of 1977; Supreme Court reversed on the merits but did not address propriety of injunctive relief); *Davis v. Richardson*, 342 F. Supp. 588 (D.Conn. 1972) (district court enjoined enforcement of provision of Social Security Act).

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dent for subsequent cases); *Baeder v. Heckler*, 768 F.2d 547, 553 (3d Cir. 1985) (in context of an individual's claim for disability benefits, district court lacked authority to issue an injunction aimed at controlling the government's behavior in every disability case in the country). *See also Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978) (noting that New York law does not allow injunctions to extend out of state due to

The plaintiffs in this case are willing to accept an injunction limited to the federal defendants' enforcement of the MBE regulation against them, but that approach raises problems in addition to those identified in the above-cited cases. A nationwide injunction protecting only the plaintiffs in this case would grant to the plaintiffs a competitive advantage over every other bidder on projects to which Subpart C is applied.

These preliminary questions raised by the plaintiffs' request for injunctive relief need not be resolved, however, because the plaintiffs have not established their entitlement to permanent injunctive relief under the standards set out in *Newman*. It is doubtful whether the plaintiffs have shown "continuing" injury by their assertions of likely future injury on other, discrete construction projects. The injury here is not continuing in the sense that prison overcrowding, for example, can be a continuing injury. *See Newman*, 683 F.2d 1312. Nor is it likely that the injury is truly susceptible of repetition. In all likelihood, this case will be appealed. If plaintiff prevails, it is doubtful that the government will continue enforcement of these regulations. *McCarthy v. Briscoe*, 553 F.2d 1005, 1007 (5th Cir. 1977).

For the foregoing reasons, the plaintiffs' request for injunctive relief is DENIED.

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concern for possible conflicts between New York law and the law of other jurisdictions.)

Effect of H. K. Porter Company.

The court concludes that the Eleventh Circuit's decision in *H. K. Porter Company* has no effect on the court's previous analysis of the MBE regulation under either the compelling interest or narrowly tailored prongs, and the court therefore declines to reconsider its previous disposition of the parties' motions for summary judgment.

First, the authorizing statute at issue in *H. K. Porter Company* is materially different from the AADA, the authorizing statute at issue here. The court in *H. K. Porter Company* concluded that the STAA *"require[d]* that minority percentage goals be established as an absolute condition precedent to the receipt of federal funds." 825 F.2d at 331 (emphasis added). The relevant portion of the STAA required the Secretary of Transportation to "take affirmative action to assure compliance with" the Act's prohibition on discrimination in any activity funded under the Act. 49 USC §1615(a)(2). In addition, the court in *H. K. Porter Company* relied heavily on the legislative history of the STAA, where a House Committee Report stated the Committee's awareness of and support for a DOT initiative requiring that percentage goals for minority participation be established. 825 F.2d at 325, citing H.R. Rep. No. 95-1485, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 6575, 6647.

Unlike the STAA, neither the language nor the legislative history of the AADA require an MBE program. The statutory language of the AADA is quite similar to that of the STAA, *see* 49 USC §2219, but there is nothing akin to a House Report specifically supporting minority percentage requirements in the legislative history of the

ADAA. The defendants point only to isolated comments by two individual representatives, which are entitled to little weight. *See Garcia v. United States*, 469 U.S. 70, 76 (1985) ("[T]he authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill.... We have eschewed reliance on the passing comments of one Member and casual statements from the floor debates.... Committee Reports are 'more authoritative' than comments from the floor") (citations omitted).

Second, the defendants' interpretation of *H. K. Porter Company* brings that case into conflict with the earlier Eleventh Circuit decision in *South Florida Chapter of Associated Contractors of America v. Metropolitan Dade County*, 723 F.2d 846 (11th Cir.), *cert. denied*, 469 U.S. 871 (1984). If such a conflict exists, the court is obligated to follow the earlier decision. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc); *Davis v. Estelle*, 529 F.2d 437, 441 (5th Cir. 1976). The defendants interpret *H. K. Porter Company* to allow Congress' findings underlying the Public Works Employment Act (PWEA) at issue in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), to be imputed to the DOT's regulation under the AADA. *South Florida Chapter*, on the other hand, requires the government body seeking to impose minimum percentage goals to show "that adequate findings have been made to ensure that the governmental body is remedying the present effects of past discrimination rather than advancing one racial or ethnic group's interest over another." 723 F.2d at 851-52. The adequate findings requirement was satisfied in *South Florida Chapter* because the district court found that "there had been 'identified discrimination against Dade

County black contractors at some point'" *by the Dade County Government. Id.* at 853. The Supreme Court subsequently imposed the same findings requirement imposed in *South Florida Chapter:*

> This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination *by the governmental unit involved* before allowing limited use of racial classifications in order to remedy such discrimination. ... [T]he relevant analysis in cases involving proof of discrimination by statistical disparity focuses on those disparities that demonstrate such prior *governmental* discrimination.

Wygant v. Jackson Board of Education, 106 S.Ct. 1842, 1847 (1986) (Powell, J.) (emphasis added). *See also id.* at 1854 (O'Connor, J., concurring) ("I agree with the Court that a governmental agency's interest in remedying 'societal' discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny").

Other courts have likewise consistently required findings of past discrimination by the governmental unit now seeking to prefer MBEs. *See, e.g., Michigan Roadbuilders Association, Inc. v. Milliken,* 834 F.2d 583, 589 (6th Cir. 1987) ("If the state had not engaged in discrimination against racial and ethnic minorities in awarding contracts to supply the state with goods and services in the past, then it cannot assert *in praesenti* that it has a compelling interest in preferring MBEs in the

award of such contracts"); *J. A. Croson Company v. City of Richmond*, 822 F.2d 1355, 1360 (4th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3462 (U.S. January 12, 1988), *prob. juris. noted*, 56 U.S.L.W. 3568 (U.S. February 23, 1988) (No. 87-998). ("For a locality to show that it enacted a racial preference as a remedial measure, it must have had a firm basis for believing that such action was required based on prior discrimination by the locality itself"); *Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922, 930 (9th Cir. 1987) ("At a minimum, the state or local government must be acting to remedy government-imposed discrimination, perpetrated by it or by one of its departments or divisions"); *Edinger and Son, Inc. v. City of Louisville, Kentucky*, 802 F.2d 213, 216 (6th Cir. 1986) ("Thus, the City should be required to present evidence of invidious discrimination"); *United States v. Starrett City Associates*, 56 U.S.L.W. 2504 (2d Cir. March 15, 1988) (noting that the use of quotas generally should be based on some history of racial discrimination or imbalance within the entity seeking to employ them).

Upholding the regulation in this case without independent findings of discrimination, by merely imputing to the DOT in this case the congressional findings underlying the PWEA, would not satisfy the findings requirement of *Wygant* and *South Florida Chapter* because there would be no way "to ensure that the governmental body is remedying the present effects of past discrimination rather than advancing one racial or ethnic group's interest over another." 723 F.2d at 851-52. If the defendants' interpretation of *H. K. Porter Company* is correct, the Supreme Court's approval of the PWEA in *Fullilove*

effectively did away with the compelling interest analysis, at least as applied to "benign" racial preferences in government contracting. The PWEA was adopted by *Congress* and governed the disbursement of particular funds for only five months, *see* April 1, 1987 Order at 25, but the defendants' interpretation of *H. K. Porter Company* makes the findings underlying the PWEA valid forever and for all legislation or administrative action. Such an interpretation ignores the obvious gap in the relative authority and competence of Congress versus an administrative agency. *See* Order at 21-23 and notes 19-21. *See also J. A. Croson Company*, 822 F.2d at 1360 (*"Localities cannot disregard the line between remedial measures and political transfers by adopting the Fullilove program as though it were boilerplate"*) (emphasis supplied).

The defendants' interpretation also ignores regional variations in the need for such race-conscious remedies — in many localities, such as the defendant Fulton County, the groups defined as "minorities" in the MBE regulation make up a majority of the population and of the governing officials. The Secretary of Transportation obviously recognized the reality of such local variations and therefore declined to specify a national minimum percentage goal for minority participation in DOT contracts. Instead, each recipient of federal aid is responsible to set its own numerical goal by determining "the potential availability of MBEs in desired areas of expertise." 49 Fed.Reg. § 23.45(g)(1). The defendants' interpretation of *H. K. Porter Company* would allow the DOT to sidestep its responsibility under *Wygant* and *South Florida Chapter* to point to findings that DOT or Fulton County had in the

past discriminated against minority contractors. In that event, this court would have no assurance that the defendants were not "advancing one racial or ethnic group's interest over another." 723 F.2d at 851-52. As the court noted in its previous order:

> Since the days of the civil rights struggles in the sixties two things at least have changed. First, many of the recipients are governed by "minorities," as is the case with Fulton County. Second, there are many more MBEs that are well financed and professionally accomplished. To insist, for example, that black leaders should give favor to well-situated black businessmen does infinitely more to legitimize cronyism than to remedy any vestigial effect of discrimination in some locales.

Order at 25 n. 23.

Finally, *H. K. Porter Company* does not change the conclusion that the DOT's MBE regulation is unconstitutional because it is not narrowly tailored. The MBE program upheld in *H. K. Porter* contained safeguards not present in the program at issue here. The court in *H. K. Porter Company* concluded that the MBE program was necessary to remedy past discrimination. 825 F.2d at 330. Here, by contrast, no such discrimination has been established, *see* Order at 29, 31, and other remedies do exist. *Id.* at 29. Moreover, the program in *H. K. Porter Company* was limited to one construction contract, since the plaintiffs in that case challenged only the county's MBE program and not the underlying federal regulations. 825 F.2d at 330-31. Here, the regulation has no durational

limit and is subject to little or no reevaluation. *See* Order at 26-28.[3]

In addition, as the previous order explained more fully, the DOT's MBE regulation at issue here also lacks critical safeguards present in the MBE programs approved in *Fullilove* and *South Florida Chapter*. The DOT's MBE regulation fails to provide either an administrative complaint procedure for reporting unjust participation by enterprises that are not *bona fide* MBEs or a special waiver to avoid dealing with an MBE who is attempting to exploit the remedial aspects of the program by charging an unreasonable price, i.e., a price not attributable to the present effects of past discrimination. Order at 24. Also, the DOT's MBE program is based on an over-inclusive definition of "Minority Business Enterprise" due to its failure to insist on a combination of minority status *and* disadvantage. *See* Order at 25-26. Courts cannot ignore any longer the fact that there are now mature minority enterprises which have overcome the effects of past discrimination and are capable of being fully competitive, nor can they ignore political and other abuses in such programs which cause the funds set aside for disadvantaged MBEs to be used for purposes other than to remedy the present effects of past discrimination.

In summary, *H. K. Porter Company* does not affect this court's conclusion that the DOT failed to establish a compelling interest in promulgating its MBE regulation

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[3] The court in *H. K. Porter Company* inexplicably considered the findings requirement as part of its narrowly tailored analysis, although *Wygant* makes it clear that the findings requirement is part of the compelling interest analysis. 106 S.Ct. at 1847-49. *See also Michigan Roadbuilders*, 834 F.2d at 589-94 and cases cited.

because: (1) the legislative history of the authorizing statute at issue in *H. K. Porter* was materially different from that of the AADA, and (2) the defendants' interpretation of *H. K. Porter* conflicts with *South Florida Chapter*, which this court is bound to follow in the event of such a conflict. Regardless of *H. K. Porter's* effect on this court's compelling interest analysis, *H. K. Porter* does not affect the narrowly tailored analysis because the DOT's MBE regulation lacks critical safeguards that were present either in *H. K. Porter Company* or in *Fullilove, United States v. Paradise*, 107 S.Ct. 1053 (1987), or *South Florida Chapter*. It is still true that "[t]he regulation gives little assurance that it will not be misapplied and gives virtually no assurance that its operation will be limited to accomplishing its remedial objective," Order at 33, and the regulation is therefore unconstitutional. Accordingly, the court declines to reconsider its previous order granting the plaintiffs' motion for summary judgment on Counts IX and X of their complaint and denying the federal defendants' motion for summary judgment on the same counts.

Conclusion

The plaintiffs' request for injunctive relief is DENIED. The court declines to reconsider its April 1, 1987 order. The Judgment prepared and entered by the Clerk of the Court on April 1, 1987 and amended on April 9, 1987, which was withdrawn and vacated by this court's May 29, 1987 order, is hereby reinstated in its entirety. Pursuant to Rule 54(b), the court directs the entry of a final judgment as to Counts IX and X of the plaintiffs' complaint because there is no just reason for delay.

SO ORDERED, this 22nd day of April, 1988.

/s/ J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

Appendix F

PART 23—PARTICIPATION BY MINORITY BUSINESS ENTERPRISE IN DEPARTMENT OF TRANSPORTATION PROGRAMS

SUBPART A—GENERAL

SEC.

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23.85 EMERGENCY ENFORCEMENT PROCEDURE.
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SCHEDULE A—INFORMATION FOR DETERMINING MINORITY BUSINESS ENTERPRISE ELIGIBILITY

SCHEDULE B—INFORMATION FOR DETERMINING JOINT VENTURE ELIGIBILITY

AUTHORITY: Sec. 905 of the Railroad Revitalization and Regulatory Reform Act of 1978 (45 U.S.C. 803); sec. 30 of the Airport and Airway Development Act of 1970, as amended (49 U.S.C. 1730); sec. 19 of the Urban Mass Transportation Act 1964, as amended (Pub. L. 95-599); Title 23 of the U.S. Code (relating to highways and highway safety); Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.); The Federal Property and Administrative Services Act of 1949 (49 U.S.C. 471 et seq.); Executive Order 11625; Executive Order 12138, unless otherwise noted.

SOURCE: 45 FR 21184, Mar. 31, 1980, unless otherwise noted.

SUBPART A—GENERAL

§ 23.1 Purpose.

(a) The purpose of this part is to carry out the Department of Transportation's policy of supporting the fullest possible participation of firms owned and controlled by minorities and women, (MBEs) in Department of Transportation programs. This includes assisting MBEs throughout the life of contracts in which they participate.

(b) This part implements in part section 905 of the Railroad Revitalization and Regulatory Reform Act of 1978 (45 U.S.C. 803); section 30 of the Airport and Airway Development Act of 1970, as amended (49 U.S.C. 1730); section 19 of the Urban Mass Transportation Act of 1964, as amended (Pub. L. 95-599); Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.); the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471 et seq.); and Title 23 of the U.S. Code (relating to highways and highway safety). This regulation supersedes all DOT regulations issued previously under these authorities, insofar as such regulations affect minority business enterprise matters in DOT financial assistance programs.

§ 23.2 Applicability.

This part applies to any DOT program through which funds are made available to members of the public for accomplishing DOT's purposes. Contracts and subcontracts which are to be performed entirely outside the United States, its possessions, Puerto Rico, and the North Mariana Islands, are exempted from this part.

§ 23.5 Definitions.

"Affirmative action" means taking specific steps to eliminate discrimination and its effects, to ensure nondiscriminatory results and practices in the future, and to involve minority business enterprises fully in contracts and programs funded by the Department.

"Applicant" means one who submits an application, request, or plan to be approved by a Departmental official or by a primary recipient as a condition to eligibility for DOT financial assistance; and "application" means such an application, request, or plan.

"Compliance" means the condition existing when a recipient or contractor has met and implemented the requirements of this part.

"Contract" means a mutually binding legal relationship or any modification thereof obligating the seller to furnish supplies or services, including construction, and the buyer to pay for them. For purposes of this part, a lease is a contract.

"Contractor" means one who participates, through a contract or subcontract, in any program covered by this part, and includes lessees.

"Department" or "DOT" means the Department of Transportation, including its operating elements.

"DOT-assisted contract" means any contract or modification of a contract between a recipient and a contractor which is paid for in whole or in part with DOT financial assistance or any contract or modification of a contract between a recipient and a lessee.

"DOT financial assistance" means financial aid provided by the Department or the United States Railroad Association to a recipient, but does not include a direct contract. The financial aid may be provided directly in the form of actual money, or indirectly in the form of guarantees authorized by statute as financial assistance services of Federal personnel, title or other interest in real or personal property transferred for less than fair market value, or any other arrangement through which the recipient benefits financially, including licenses for the construction or operation of a Deep Water Port.

"Departmental element" means the following parts of DOT:

(a) The Office of the Secretary (OST):

(b) The Federal Aviation Administration (FAA);

(c) The United States Coast Guard (USCG);

(d) The Federal Highway Administration (FHWA);

(e) The Federal Railroad Administration (FRA);

(f) The National Highway Traffic Safety Administration (NHTSA);

(g) The Urban Mass Transportation Administration (UMTA);

(h) The St. Lawrence Seaway Development Corporation (SLSDC); and

(i) The Research and Special Programs Administration (RSPA).

"Joint venture" means an association of two or more businesses to carry out a single business enterprise for profit for which purpose they combine their property, capital, efforts, skills, and knowledge.

"Lessee" means a business or person that leases, or is negotiating to lease, property from a recipient or the Department on the recipient's or Department's facility for the purpose of operating a transportation-related activity or for the provision of goods or services to the facility or to the public on the facility.

"Minority" means a person who is a citizen or lawful permanent resident of the United States and who is:

(a) Black (a person having origins in any of the black racial groups of Africa);

(b) Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race);

(c) Portuguese (a person of Portuguese, Brazilian, or other Portuguese culture or origin, regardless of race);

(d) Asian American (a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands); or

(e) American Indian and Alaskan Native (a person having origins in any of the original peoples of North America.)

(f) Members of other groups, or other individuals, found to be economically and socially disadvantaged by the Small Business Administration under section 8(a) of the Small Business Act, as amended (15 U.S.C. 637(a)).

"Minority business enterprise" or "MBE" means a small business concern, as defined pursuant to section 3 of the Small Business Act and implementing regulations, which is owned and controlled by one or more minorities or women. This definition applies only to financial

assistance programs. For the purposes of this part, owned and controlled means a business:

(a) Which is at least 51 per centum owned by one or more minorities or women or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by one or more minorities or women; and

(b) Whose management and daily business operations are controlled by one or more such individuals.

"MBE coordinator" means the official designated by the head of the Department element to have overall responsibility for promotion of minority business enterprise in his/her Departmental element.

"Noncompliance" means the condition existing when a recipient or contractor has failed to implement the requirements of this part.

"Primary recipient" is a recipient who receives DOT financial assistance and passes some or all of this assistance on to another recipient.

"Program" means any undertaking by a recipient to use DOT financial assistance, and includes the entire activity any part of which receives DOT financial assistance.

"Recipient" means any entity, public or private, to whom DOT financial assistance is extended, directly or through another recipient for any program.

"Secretary" means the Secretary of transportation or any person whom he/she has designated to act for him/her.

"Set-aside" means a technique which limits consideration of bids or proposals to those submitted by MBEs.

[45 FR 21184, Mar. 31, 1980, as amended at 46 FR 60459, Dec. 10, 1981]

§ 23.7 Discrimination prohibited.

No person shall be excluded from participation in, denied the benefits of, or otherwise discriminated against in connection with the award and performance of any contract covered by this Part, on the grounds of race, color, national origin, or sex.

SUBPART B—[RESERVED]

SUBPART C—DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

§ 23.41 General.

(a) *Responsibilities of Applicants and Recipients.*

(1) All applicants and recipients shall follow the requirements of § 23.43.

(2) Applicants and recipients in the following categories who will let DOT-assisted contracts shall implement an MBE program containing the elements set forth in § 23.45(e) through (i). This program shall be submitted for approval to the DOT element concerned with the application for financial assistance or project approval.

(i) Applicants for funds in excess of $250,000 exclusive of transit vehicle purchases under sections 3, 5, and 17 of the Urban Mass Transportation Act of 1964, as amended, and Federal Aid Urban Systems;

(ii) Applicants for funds in excess of $100,000 under sections 6 and 8 of the Urban Mass Transportation Act of 1964, as amended;

(iii) Applicants for Section 402 program funds of the National Highway Traffic Safety Administration;

(iv) Applicants for funds in excess of $250,000 awarded by the Federal Aviation Administration to general aviation airports;

(v) Applicants for funds in excess of $400,000 awarded by the Federal Aviation Administration to non-hub airports; and

(vi) Applicants for planning funds in excess of $75,000 awarded by the Federal Aviation Administration.

(vii) Licensees or applicants for a license under the Deepwater Port Act of 1974 (33 U.S.C. 1501 *et seq.*).

(3) All applicants and recipients in the following categories who will let DOT-assisted contracts shall implement an MBE program containing all the elements set forth in § 23.45. The program shall be submitted for approval to the DOT element concerned with the application for assistance or project approval.

(i) Applicants for Federal-aid highway program funds;

(ii) Applicants for funds in excess of $500,000 exclusive of transit vehicle purchases under sections 3, 5, and 17 of the Urban Mass Transportation Act of 1964, as amended, and Federal Aid Urban Systems;

(iii) Applicants for funds in excess of $200,000 under sections 6 and 8 of the Urban Mass Transportation Act of 1964, as amended;

(iv) Applicants for funds in excess of $500,000 awarded by the Federal Aviation Administration to large, medium and small hub airports; and

(v) Applicants for financial assistance programs, including loan guarantees, by the Federal Railroad Administration and the United States Railway Association.

(b) *Approval Requirement.* Applications and funding agreements are signed and authorizations to proceed are approved only after the applicant's MBE program has been approved by the Departmental element. This requirement applies to applications, authorizations to proceed requested by Federal-aid highway program recipients, and requests for draw downs from the U.S. Railway Association submitted 90 days or more following the effective date of this part.

(c) *Effect of agreement.* The MBE program prepared by the applicant and the commitment made by the applicant to carry out the MBE program is incorporated into and becomes part of this agreement and subsequent financial assistance agreements. The agreement between the Department and the recipient shall contractually bind the recipient to the commitments made in the MBE program, as approved by the Department. Failure to keep these commitments shall be deemed noncompliance with this part. Once submitted and approved, an MBE program is applicable to all DOT-assisted contracts solicited and let by the applicant after the approval date of

the MBE program regardless of the approval date of the grant or project under which the contracts are let.

(d) *Other MBE Programs.* (1) Applicants meeting the criteria set forth in paragraphs (a)(2) and (3) of this section who have formulated MBE programs under previous requirements of DOT or other agencies shall revise these programs to conform to the requirements of this part prior to the approval of their next application.

(2) An MBE program approved by one Departmental element is acceptable to all Departmental elements. Applicants having an approved MBE program are not required to resubmit the program or to produce a new program for future applications, as long as all requirements for approval continue to be met and implementation of the program is achieving compliance. The Departmental element reassesses its approval of the MBE program of continuing recipients at least annually.

(e) *Transit Vehicle Manufacturers.* Transit vehicle manufacturers who wish to bid on UMTA-assisted transit vehicle procurement contracts shall have a UMTA-approved MBE program. Each UMTA recipient shall require these manufacturers to certify that they have such a program as a condition for bidding on UMTA-assisted contracts.

(f) *Exemptions.* The head of the Departmental element may, under appropriate circumstances, and with the concurrence of the Secretary, grant deviations or exemptions from this subpart. A request for deviation or exemption from this subpart shall be in writing and shall include a showing as to how the particular situation is exceptional and how the modified program complies sub-

stantially with this part. If the applicant asserts that State or local law prohibits it from including a particular provision in its program, the applicant shall provide copies of all legal citations supporting the claim.

§ 23.43 General requirements for recipients.

(a) Each recipient shall agree to abide by the statements in paragraphs (a)(1) and (2) of this section. These statements shall be included in the recipient's DOT financial assistance agreement and in all subsequent agreements between the recipient and any subrecipient and in all subsequent DOT-assisted contracts between recipients or subrecipients and any contractor.

(1) *"Policy.* It is the policy of the Department of Transportation that minority business enterprises as defined in 49 CFR Part 23 shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under this agreement. Consequently the MBE requirements of 49 CFR Part 23 apply to this agreement."

(2) *"MBE Obligation.* (i) The recipient or its contractor agrees to ensure that minority business enterprises as defined in 49 CFR Part 23 have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with Federal funds provided under this agreement. In this regard all recipients or contractors shall take all necessary and reasonable steps in accordance with 49 CFR Part 23 to ensure that minority business enterprises have the maximum opportunity to compete for and perform contracts. Recipients and their contractors shall not discriminate on the basis of race, color, national origin, or

sex in the award and performance of DOT-assisted contracts."

(b) Each DOT financial assistance agreement shall include the following: "If as a condition of assistance the recipient has submitted and the Department has approved a minority business enterprise affirmative action program which the recipient agrees to carry out, this program is incorporated into this financial assistance agreement by reference. This program shall be treated as a legal obligation and failure to carry out its terms shall be treated as a violation of this financial assistance agreement. Upon notification to the recipient of its failure to carry out the approved program the Department shall impose such sanctions as noted in 49 CFR Part 23, Subpart E, which sanctions may include termination of the agreement or other measures that may affect the ability of the recipient to obtain future DOT financial assistance."

(c) The recipient shall advise each subrecipient, contractor, or subcontractor that failure to carry out the requirements set forth in § 23.43(a) shall constitute a breach of contract and, after the notification of the Department, may result in termination of the agreement or contract by the recipient or such remedy as the recipient deems appropriate.

(d) Recipients shall take action concerning lessees as follows:

(1) Recipients shall not exclude MBEs from participation in business opportunities by entering into long-term, exclusive agreements with non-MBEs for the operation of major transportation-related activities or

major activities for the provision of goods and services to the facility or to the public on the facility.

(2) Recipients required to submit affirmative action programs under § 23.41 (a)(2) or (a)(3) that have business opportunities for lessees shall submit to the Department for approval with their programs overall goals for the participation as lessees of firms owned and controlled by minorities and firms owned and controlled by women. These goals shall be for a specified period of time and shall be based on the factors listed in § 23.45(g)(5). Recipients shall review these goals at least annually, and whenever the goals expire. The review shall analyze projected versus actual MBE participation during the period covered by the review and any changes in factual circumstances affecting the selection of goals. Following each review, the recipient shall submit new overall goals to the Department for approval. Recipients that fail to meet their goals for MBE lessees shall demonstrate to the Department in writing that they made reasonable efforts to meet the goals.

(3) Except as provided in this section, recipients are not required to include lessees in their affirmative action programs. Lessees themselves are not subject to the requirements of this Part, except for the obligation of § 23.7 to avoid discrimination against MBEs.

§ 23.45 Required MBE program components.

(a) *A policy statement, expressing a commitment to use MBEs in all aspects of contracting to the maximum extent feasible.* (1) The applicant's policymaking body (Board, Council, etc.) shall issue a policy statement, signed by the chairperson, which expresses its commit-

ment to the program, outlines the various levels of responsibility and states the objectives of the program. The policy statement shall be circulated throughout the applicant's organization and to minority, female, and nonminority community and business organizations.

(b) *The designation of liaison officer, as well as such support staff as may be necessary and proper to administer the program, and a description of the authority, responsibility, and duties of the liaison officer and support staff.* (1) The Chief Executive Officer of the recipient shall designate an MBE liaison officer and adequate staff to administer the MBE program. The MBE liaison officer shall report directly to the Chief Executive Officer.

(2) The MBE liaison officer shall be responsible for developing, managing, and implementing the MBE program on a day-to-day basis; for carrying out technical assistance activities for MBEs; and for disseminating information on available business opportunities so that MBEs are provided an equitable opportunity to bid on the applicant's contracts.

(c) *Procedures to ensure that MBEs have an equitable opportunity to compete for contracts and subcontracts.* The recipient shall develop and use affirmative action techniques to facilitate MBE participation in contracting activities. These techniques include:

(1) Arranging solicitations, time for the presentation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation MBEs.

(2) Providing assistance to MBEs in overcoming barriers such as the inability to obtain bonding, financing, or technical assistance.

(3) Carrying out information and communications programs on contracting procedures and specific contracting opportunities in a timely manner, with such programs being bilingual where appropriate.

(d) *Opportunities for the use of banks owned and controlled by minorities or women.* (1) The recipient shall thoroughly investigate the full extent of services offered by banks owned and controlled by minorities or women in its community and make the greatest feasible use of these banks.

(2) Recipients shall also encourage prime contractors to use the services of banks owned and controlled by minorities or women.

(e) *MBE directory.* (1) The recipient shall have available a directory or source list to facilitate identifying MBEs with capabilities relevant to general contracting requirements and to particular solicitations. The recipient shall make the directory available to bidders and proposers in their efforts to meet the MBE requirements. It shall specify which firms the Department, recipient, or the Small Business Administration has determined to be eligible MBEs in accordance with procedures set forth in this subpart.

(f) *Procedures to ascertain the eligibility of MBEs and joint ventures involving MBEs.* (1) To ensure that its MBE program benefits only firms owned and controlled by minorities or women, the recipient shall certify the eligibility of MBEs and joint ventures involving MBEs

that are named by the competitors in accordance with this subpart. Recipients may, at their own discretion, accept certifications made by other DOT recipients.

(2) Recipients shall require their prime contractors to make good faith efforts to replace an MBE subcontractor that is unable to perform successfully with another MBE. The recipient shall approve all substitutions of subcontractors before bid opening and during contract performance, in order to ensure that the substitute firms are eligible MBEs.

(g) *Percentage goals for the dollar value of work to be awarded to MBEs.* (1) Once the recipient has reviewed proposed contracting to identify those contracting activities which have the greatest potential for MBE participation, the recipient shall set goals that are practical and related to the potential availability of MBEs in desired areas of expertise.

(2) The applicant/recipient shall establish two types of MBE goals:

(i) Overall goals for its entire MBE program, for a specified period of time (e.g. one year), or for a specific project, (e.g. the construction of a facility); and

(ii) Contract goals on each specific prime contract with subcontracting possibilities, which the bidder or proposer must meet or exceed or demonstrate that it could not meet despite its best efforts.

(3)(i) Recipients shall submit their overall goals and a description of the methodology used in establishing them with their MBE program. When the overall goals expire, new overall goals shall be set and submitted to the

Department for approval. Contract goals need not be submitted in the applicant's MBE program, but the program shall contain a description of the methodology to be used in establishing them. Contract goals may require approval by the Department prior to contract solicitation.

(ii) At the time the recipient submits its overall goals to the Department for approval, the recipient shall publish a notice announcing these goals, informing the public that the goals and a description of how they were selected are available for inspection during normal business hours at the principal office of the recipient for 30 days following the date of the notice, and informing the public that the Department and the recipient will accept comments on the goals for 45 days from the date of the notice. The notice shall include addresses to which comments may be sent, and shall be published in general circulation media and available minority-focus media and trade association publications, and shall state that the comments are for informational purposes only.

(4) Recipients shall set separate overall and contract goals for firms owned and controlled by minorities and firms owned and controlled by women.

(5) The applicant shall consider the following factors in setting overall goals:

(i) Overall goals shall be based on projection of the number and types of contracts to be awarded by the applicant and a projection of the number and types of MBEs likely to be available to complete for contracts from the recipient over the period during which the goals will be in effect.

(ii) Overall goals shall also be based on past results of the applicant's/recipient's efforts to contract with MBEs and the reasons for the high or low level of those results.

(6) The applicant/recipient shall review the overall goals at least annually. The review process shall analyze projected versus actual MBE participation during the previous year. The necessary revisions shall be made based on the analysis and submitted to the Department for approval.

(7) Goals shall be set for specific contracts based on the known availability of qualified MBEs.

(8) Recipients and contractors shall, at a minimum, seek MBEs in the same geographic area in which they seek contractors or subcontractors generally for a given solicitation. If the recipient or contractor cannot meet the goals using MBEs from this geographical area, the recipient or contractor, as part of its efforts to meet the goal, shall expand its search to a reasonable wider geographic area.

(h) *A means to ensure that competitors make good faith efforts to meet MBE contract goals:*

(1) For all contracts for which contract goals have been established, the recipient shall, in the solicitation, inform competitors that the apparent successful competitor will be required to submit MBE participation information to the recipient and that the award of the contract will be conditioned upon satisfaction of the requirements established by the recipient pursuant to this subsection.

(i) The apparent successful competitor's submission shall include the following information:

(A) The names and addresses of MBE firms that will participate in the contract;

(B) A description of the work each named MBE firm will perform;

(C) The dollar amount of participation by each named MBE firm.

(ii) The recipient may select the time at which it requires MBE information to be submitted. *Provided,* that the time of submission shall be before the recipient commits itself to the performance of the contract by the apparent successful competitor.

(2) If the MBE participation submitted in response to paragraph (h)(1) of this section does not meet the MBE contract goals, the apparent successful competitor shall satisfy the recipient that the competitor has made good faith efforts to meet the goals.

(i) The recipient may prescribe other requirements of equal or greater effectiveness in lieu of good faith efforts. Any recipient choosing alternative requirements shall inform the DOT office concerned by letter of the content of the requirements it has prescribed within 30 days of the effective date of this subsection. The recipient may put these alternative requirements into effect immediately and prior DOT approval of alternative requirements is not necessary.

(ii) If the Department determines that the alternative requirements are not as or more effective than the good faith efforts provisions of this subsection, the Department

may require the recipient to use the good faith efforts requirements of this subsection instead of the requirements it has prescribed.

(3) Meeting MBE contract goals, making good faith efforts as provided in paragraph (h)(2) of this section, or meeting requirements established by recipients in lieu of good faith efforts, is a condition of receiving a DOT-assisted contract for which contract goals have been established.

(i) [Reserved]

(j) *A description of the methods by which the recipient will require subrecipients, contractors, and subcontractors to comply with applicable MBE requirements.* (1) The recipient shall include in its MBE program a description and the specific language of any preconditions to subgrants or contracts pertaining to the use of MBEs, including subcontracting programs, it awards with DOT funds in addition to those required by this section. It shall specify on what size and/or type of contracts and subgrants it includes such preconditions. The description shall contain a summary of the ways the recipient provides help to its subrecipients, contractors, and subcontractors in drafting and implementing their programs for using MBEs. The description shall also include the means by which the recipient enforces the requirements placed on subrecipients, contractors and subcontractors.

(2) Any MBE subcontracting programs required by the recipient in addition to those required by this section shall be submitted to the recipient by the apparent successful bidder/proposer. The bidders/proposers shall

be advised in the solicitation that failure to submit the additional MBE subcontracting program shall make the bidder/proposer ineligible for award.

(k) *Procedures by which the applicant/recipient will implement MBE set-asides.* Where not prohibited by state or local law and determined by the recipient to be necessary to meet MBE goals, procedures to implement MBE set-asides shall be established. MBE set-asides shall be used only in cases where at least three MBEs with capabilities consistent with contract requirements exist so as to permit competition.

APPENDIX A-GUIDANCE CONCERNING GOOD FAITH EFFORTS

To determine whether a competitor that has failed to meet MBE contract goals may receive the contract, the recipient must decide whether the efforts the competitor made to obtain MBE participation were "good faith efforts" to meet the goals. Efforts that are merely *pro forma* are not good faith efforts to meet the goals. Efforts to obtain MBE participation are not good faith efforts to meet the goals, even if they are sincerely motivated, if, given all relevant circumstances, they could not reasonably be expected to produce a level of MBE participation sufficient to meet the goals. In order to award a contract to a competitor that has failed to meet MBE contract goals, the recipient must determine that the competitor's efforts were those that, given all relevant circumstances, a competitor actively and aggressively seeking to meet the goals would make.

To assist recipients in making the required judgment, the Department has prepared a list of the kinds

of efforts that contractors may make in obtaining MBE participation. It is not intended to be a mandatory checklist; the Department does not require recipients to insist that a contractor do any one, or any particular combination, of the things on the list. Nor is the list intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases. In determining whether a contractor has made good faith efforts, it will usually be important for a recipient to look not only at the different kinds of efforts that the contractor has made, but also the quantity and intensity of these efforts.

The Department offers the following list of kinds of efforts that recipients may consider:

(1) Whether the contractor attended any pre-solicitation or pre-bid meetings that were scheduled by the recipient to inform MBEs of contracting and subcontracting opportunities;

(2) Whether the contractor advertised in general circulation, trade association, and minority-focus media concerning the subcontracting opportunities;

(3) Whether the contractor provided written notice to a reasonable number of specific MBEs that their interest in the contract was being solicited, in sufficient time to allow the MBEs to participate effectively;

(4) Whether the contractor followed up initial solicitations of interest by contacting MBEs to determine with certainty whether the MBEs were interested;

(5) Whether the contractor selected portions of the work to be performed by MBEs in order to increase the

likelihood of meeting the MBE goals (including, where appropriate, breaking down contracts into economically feasible units to facilitate MBE participation);

(6) Whether the contractor provided interested MBEs with adequate information about the plans, specifications and requirements of the contract;

(7) Whether the contractor negotiated in good faith with interested MBEs, not rejecting MBEs as unqualified without sound reasons based on a thorough investigation of their capabilities;

(8) Whether the contractor made efforts to assist interested MBEs in obtaining bonding, lines of credit, or insurance required by the recipient or contractor; and

(9) Whether the contractor effectively used the services of available minority community organizations; minority contractors' groups; local, state and Federal minority business assistance offices; and other organizations that provide assistance in the recruitment and placement of MBEs.

(Title VI of the Civil Rights Act of 1964; sec. 30 of the Airport and Airway Development Act of 1970, as amended; sec. 905 of the Railroad Revitalization and Regulatory Reform Act of 1976; sec. 19 of the Urban Mass Transportation Act of 1964, as amended; 23 U.S.C. 324; Executive Order 11625; Executive Order 12138)

[45 FR 21184, Mar. 31, 1980, as amended at 46 FR 23461, Apr. 27, 1981]

§ 23.47 Counting MBE participation toward meeting MBE goals.

MBE participation shall be counted toward meeting MBE goals set in accordance with this subpart as follows:

(a) Once a firm is determined to be an eligible MBE in accordance with this subpart, the total dollar value of the contract awarded to the MBE is counted toward the applicable MBE goals.

(b) The total dollar value of a contract to an MBE owned and controlled by both minority males and non-minority females is counted toward the goals for minorities and women, respectively, in proportion to the percentage of ownership and control of each group in the business. The total dollar value of a contract with an MBE owned and controlled by minority women is counted toward either the minority goal or the goal for women, but not to both. The contractor or recipient employing the firm may choose the goal to which the contract value is applied.

(c) A recipient or contractor may count toward its MBE goals a portion of the total dollar value of a contract with a joint venture eligible under the standards of this subpart equal to the percentage of the ownership and controls of the MBE partner in the joint venture.

(d)(1) A recipient or contractor may count toward its MBE goals only expenditures to MBEs that perform a commercially useful function in the work of a contract. An MBE is considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing, and su-

pervising the work involved. To determine whether an MBE is performing a commercially useful function, the recipient or contractor shall evaluate the amount of work subcontracted, industry practices, and other relevant factors.

(2) Consistent with normal industry practices, an MBE may enter into subcontracts. If an MBE contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the MBE shall be presumed not to be performing a commercially useful function. The MBE may present evidence to rebut this presumption to the recipient. The recipient's decision on the rebuttal of this presumption is subject to review by the Department.

(e) A recipient or contractor may count toward its MBE goals expenditures for materials and supplies obtained from MBE suppliers and manufacturers, provided that the MBEs assume the actual and contractual responsibility for the provision of the materials and supplies.

(1) The recipient or contractor may count its entire expenditure to an MBE manufacturer (i.e., a supplier that produces goods from raw materials or substantially alters them before resale).

(2) The recipient may count 20 percent of its expenditures to MBE suppliers that are not manufacturers, provided that the MBE supplier performs a commercially useful function in the supply process.

§ 23.49 Maintenance of records and reports.

(a) In order to monitor the progress of its MBE program the applicant/recipient shall develop a recordkeeping system which will identify and assess MBE contract awards, prime contractors' progress in achieving MBE subcontract goals, and other MBE affirmative action efforts.

(b) Specifically, the applicant/recipient shall maintain records showing:

(1) Procedures which have been adopted to comply with the requirements of this part.

(2) Awards to MBEs. These awards shall be measured against projected MBE awards and/or MBE goals. To assist in this effort, the applicant shall obtain regular reports from prime contractors on their progress in meeting contractual MBE obligations.

(3) Specific efforts to identify and award contracts to MBEs.

(c) Records shall be available upon the request of an authorized officer or employee of the government.

(d)(1) The recipient shall submit reports conforming in frequency and format to existing contract reporting requirements of the applicable Departmental element. Where no such contract reporting requirements exist, MBE reports shall be submitted quarterly.

(2) These reports shall include as a minimum:

(i) The number of contracts awarded to MBEs;

(ii) A description of the general categories of contracts awarded to MBEs;

(iii) The dollar value of contracts awarded to MBEs;

(iv) The percentage of the dollar value of all contracts awarded during this period which were awarded to MBEs; and

(v) An indication of whether and the extent of which the percentage met or exceeded the goal specified in the application.

(3) The records and reports required by this section shall provide information relating to firms owned and controlled by minorities separately from information relating to firms owned and controlled by women. If the records and reports include any section 8(a) contractors that are not minorities or women, information concerning these contractors shall also be recorded and reported separately.

§ 23.51 Certification of the eligibility of minority business enterprises.

(a) To ensure that this part benefits only MBEs which are owned and controlled in both form and substance by one or more minorities or women, DOT recipients shall use Schedules A and B (reproduced at the end of this Part) to certify firms who wish to participate as MBEs in DOT under this part.

(b) Except as provided in paragraph (c) of this section, each business, including the MBE partner in a joint venture, wishing to participate as a MBE under this part in a DOT-assisted contract shall complete and submit Schedule A. Each entity wishing to participate as a joint venture MBE under this part in DOT-assisted contracts shall in addition complete and submit Schedule B. The

schedule(s) shall be signed and notarized by the authorized representative of the business entity. A business seeking certification as an MBE shall submit the required schedules with its bid or proposal for transmission to the contracting agency involved.

(c) Under the following circumstances, a business seeking to participate as an MBE under this subpart need not submit schedule A or B:

(1) If a DOT recipient has established a different certification process that DOT has determined to be as or more effective than the process provided for by this section. Where such a process exists, potential MBE contractors shall submit the information required by the recipient's process.

(2) If the potential MBE contractor states in writing that it has submitted the same information to or has been certified by the DOT recipient involved, any DOT element, or another Federal agency that uses essentially the same definition and ownership and control criteria as DOT. The potential MBE contractor shall obtain the information and certification (if any) from the other agency and submit it to the recipient or cause the other agency to submit it. The recipient may rely upon a certification. Where another agency has collected information but not made a determination concerning eligibility, the DOT recipient shall make its own determination based on the information it has obtained from the other agency.

(3) If the potential MBE contractor has been determined by the Small Business Administration to be owned and controlled by socially and economically

disadvantaged individuals under section 8(a) of the Small Business Act, as amended.

§ 23.53 Eligibility standards.

(a) The following standards shall be used by recipients in determining whether a firm is owned and controlled by one or more minorities or women is and shall therefore be eligible to be certified as an MBE. Businesses aggrieved by the determination may appeal in accordance with procedures set forth in § 23.55.

(1) Bona fide minority group membership shall be established on the basis of the individual's claim that he or she is a member of a minority group and is so regarded by that particular minority community. However, the recipient is not required to accept this claim if it determines the claim to be invalid.

(2) An eligible minority business enterprise under this part shall be an independent business. The ownership and control by minorities or women shall be real, substantial and continuing and shall go beyond the *pro forma* ownership of the firm as reflected in its ownership documents. The minority or women owners shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with their ownership interests, as demonstrated by an examination of the substance rather than form of arrangements. Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient for recognition as an MBE. In determining whether a potential MBE is an independent business, DOT recipients shall consider all relevant factors, including the date the business was established, the adequacy of its resources for the work of

the contract, and the degree to which financial, equipment leasing, and other relationships with nonminority firms vary from industry practice.

(3) The minority or women owners shall also possess the power to direct or cause the direction of the management of policies of the firm and to make the day-to-day as well as major decisions on matters of management, policy, and operations. The firm shall not be subject to any formal or informal restrictions which limit the customary discretion of the minority or women owners. There shall be no restrictions through, for example, bylaw provisions, partnership agreements, or charter requirements for cumulative voting rights or otherwise that prevent the minority or women owners, without the cooperation or vote of any owner who is not a minority or woman, from making a business decision of the firm.

(4) If the owners of the firm who are not minorities or women are disproportionately responsible for the operation of the firm, then the firm is not controlled by minorities or women and shall not be considered an MBE within the meaning of this part. Where the actual management of the firm is contracted out to individuals other than the owner, those persons who have the ultimate power to hire and fire the managers can, for the purposes of this part, be considered as controlling the business.

(5) All securities which constitute ownership and/or control of a corporation for purposes of establishing it as an MBE under this part shall be held directly by minorities or women. No securities held in trust, or by any

guardian for a minor, shall be considered as held by minority or women in determining the ownership or control of a corporation.

(6) The contributions of capital or expertise by the minority or women owners to acquire their interests in the firm shall be real and substantial. Examples of insufficient contributions include a promise to contribute capital, a note payable to the firm or its owners who are not socially and economically disadvantaged, or the mere participation as an employee, rather than as a manager.

(b) In addition to the above standards, DOT recipients shall give special consideration to the following circumstances in determining eligibility under this part.

(1) Newly formed firms and firms whose ownership and/or control has changed since the date of the advertisement of the contract are closely scrutinized to determine the reasons for the timing of the formation of or change in the firm.

(2) A previous and/or continuing employer-employee relationship between or among present owners is carefully reviewed to ensure that the employee-owner has management responsibilities and capabilities discussed in this section.

(3) Any relationship between an MBE and a business which is not an MBE which has an interest in the MBE is carefully reviewed to determine if the interest of the non-MBE conflicts with the ownership and control requirements of this section.

(c) A joint venture is eligible under this part if the MBE partner of the joint venture meets the standards for

an eligible MBE set forth above and the MBE partner is responsible for a clearly defined portion of the work to be performed and shares in the ownership, control, management responsibilities, risks, and profits of the joint venture.

(d) A joint venture is eligible to compete in an MBE set-aside under this part if the MBE partner of the joint venture meets the standards of an eligible MBE set forth above, and the MBE partner's share in the ownership, control, and management responsibilities, risks, and profits of the joint venture is at least 51 percent and the MBE partner is responsible for a clearly defined portion of the work to be performed.

(e) A business wishing to be certified as an MBE or joint venture MBE by a DOT recipient shall cooperate with the recipient in supplying additional information which may be requested in order to make a determination.

(f) Once certified, an MBE shall update its submission annually by submitting a new Schedule A or certifying that the Schedule A on file is still accurate. At any time there is a change in ownership or control of the firm, the MBE shall submit a new schedule A.

(g) Except as provided in § 23.55, the denial of a certification by the Department or a recipient shall be final, for that contract and other contracts being let by the recipient at the time of the denial of certification. MBEs and joint ventures denied certification may correct deficiencies in their ownership and control and apply for certification only for future contracts.

(h) Recipients shall safeguard from disclosure to unauthorized persons information that reasonably may be regarded as confidential business information, consistent with Federal, state and local law.

§ 23.55 Appeals of denials of certification as an MBE.

(a) *Filing.* Any firm which believes that it has been wrongly denied certification as an MBE or joint venture under §§ 23.51 and 23.53 by the Department or a recipient of DOT financial assistance may file an appeal in writing, signed and dated, with the Department. The appeal shall be filed no later than 180 days after the date of denial of certification. The Secretary may extend the time for filing or waive the time limit in the interest of justice, specifying in writing the reasons for so doing. Third parties who have reason to believe that another firm has been wrongly denied or granted certification as an MBE or joint venture may advise the Secretary. This information is not considered an appeal pursuant to this section.

(b) *Decision to Investigate.* The Secretary ensures that a prompt investigation is made pursuant to prescribed DOT Title VI investigation procedures.

(c) *Status of Certification During the Investigation.* The Secretary may at his/her discretion, deny the MBE or joint venture in question eligibility to participate as an MBE DOT-assisted contracts let during the pendancy of the investigation, after providing the MBE or joint venture in question an opportunity to show cause by written statement to the Secretary why this should not occur.

(d) *Cooperation in Investigation.* All parties shall cooperate fully with the investigation. Failure or refusal

to furnish requested information or other failure to cooperate is a violation of this part.

(e) *Determinations*. the Secretary makes one of the following determinations and informs the MBE or joint venture in writing of the reasons for the determination:

(1) The MBE or joint venture is certified; or

(2) The MBE or joint venture is not eligible to be certificate and is denied eligibility to participate as an MBE in any direct or DOT-assisted contract until a new application for certification is approved by the recipient.

SUBPART D—[RESERVED]

SUBPART E—COMPLIANCE AND ENFORCEMENT

§ 23.71 [Reserved]

§ 23.73 Complaints.

(a) *Filing*. Any person who believes himself or herself, another person, or any specific class of individuals to be subjected to a violation of this part may file a complaint in writing, signed and dated, with the Department. The complaint shall be filed no later than 180 days after the date of an alleged violation or the dates on which a continuing course of conduct in violation of this part was disclosed. The Secretary may extend the time for filing or waive the time limit in the interest of justice, specifying in writing the reason for so doing.

(b) *Investigations*. The Secretary ensures that a prompt investigation is made pursuant to prescribed DOT Title VI investigation procedures.

(c) *Cooperation in Investigation*. The respondent to the complaint shall cooperate fully with the in-

vestigation. Failure or refusal by the respondent to furnish requested information or other failure to cooperate is a violation of this part.

(d) *Determinations*. Upon completion of the investigation, the Secretary informs the recipient or contractor and complainant of the results of the investigation in writing. If the investigation indicates a failure to comply with this part, the conciliation procedures of § 23.81 and, if necessary, the enforcement procedures of § 23.83 are followed.

(e) *Intimidation or Retaliation Acts Prohibited*. No recipient, contractor, or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by this part, or because he or she made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainants shall be kept confidential at their election during the conduct of any investigation, proceeding, or hearing under this part. But when such confidentiality is likely to hinder the investigation the complainant shall be advised for the purpose of waiving the privilege.

§ 23.75 Compliance reviews of recipients.

(a) *Desk Audit*. All compliance reviews conducted after financial assistance has been approved or contracts have been awarded begin with a desk audit. The desk audit is a review of all material and information concerning the recipient's MBE performance.

(b) *On-Site Review*. An on-site review includes interviews, visits to project or facility sites receiving DOT

funds, and inspection of any statistical or documentary materials relevant to the recipient's performance which were not available for review during the desk audit.

(c) *Cooperation*. The recipient shall cooperate fully with these reviews. Failure or refusal to furnish requested information or failure to cooperate is a violation of this part.

(d) *Determination*. As a result of its review of the recipient, the Departmental element civil rights staff makes one of the following determinations:

(1) The recipient is in compliance with its MBE obligations; or

(2) There is reasonable cause to believe that the recipient is not in compliance with its MBE obligations in certain specified respects. Proceedings shall be begun in accordance with § 23.81 and, if necessary, § 23.83.

§ 23.77 [Reserved]

§ 23.79 [Reserved]

§ 23.81 Conciliation procedures for financial assistance programs.

(a) *Reasonable Cause Notice*. Whenever the responsible office of civil rights makes a determination of reasonable cause to believe that a recipient is in noncompliance, a notice is sent promptly and in writing by registered mail, return receipt requested, describing the areas of noncompliance requiring the applicant or recipient to show cause within 30 days why enforcement proceedings or other appropriate action to ensure compliance should not be instituted and offering the recipient

an opportunity to conciliate. The responsible office of civil rights shall pursue conciliation efforts for at least 30 days from the date of the reasonable cause notice.

(1) *Successful conciliation.* If a conciliation agreement is signed by the Departmental element's office of civil rights and recipient, it is approved or disapproved by the head of the Departmental element within 20 days of receiving it. If the head of the Departmental element disapproves the agreement, the reasons therefor are stated in writing. The head of the Departmental element may propose amendments to the agreement which are forwarded to the recipient, requesting the recipient's acceptance or rejection of the amended agreement within 20 days of receipt.

(2) *Unsuccessful conciliation.* If no agreement is signed within 120 days of the notice of reasonable cause enforcement proceedings set forth in § 23.83 begin. The head of the responsible office of civil rights, upon a written determination that an additional 30 days are needed to complete conciliation, may extend the conciliation period for 30 days. Subsequent extensions may be made upon such written determinations. The determinations shall include reasons for the extension and shall be provided to the complainant and respondent.

(b) *Effect of conciliation agreement.* If a conciliation agreement is approved, the existence of the determination of noncompliance does not act as a bar to the provision of financial assistance as long as the terms of the agreement are fulfilled. A compliance review is

conducted by the Department element within nine months of the approval of an agreement.

§ 23.83 Enforcement proceedings for financial assistance programs.

(a) Whenever conciliation efforts pursuant to § 23.81 are unsuccessful, enforcement proceedings begin. These proceedings are conducted in accordance with the Department's procedures for enforcing Title VI (49 CFR Part 21).

(b) A finding of noncompliance and the imposition of any sanction pursuant to these proceedings is binding on all other Departmental elements. Sanctions are limited to the recipient with respect to whom the noncompliance finding has been made and to the particular program or activity, or part thereof, in which noncompliance has been found.

§ 23.85 Emergency enforcement procedure.

(a) *General.* Whenever the Secretary determines that the conciliation and enforcement proceedings set forth in §§ 23.81 and 23.83 will not result in the timely and adequate enforcement of the provisions of this Part, he/she initiates special enforcement procedures to obtain compliance.

(b) *Emergency Reasonable Cause Notice.* A notice is sent, registered mail, return receipt requested, describing the areas of alleged noncompliance, setting forth the reasons why the normal course of conciliation and enforcement pursuant to §§ 23.81 and 23.83 will not result in timely and adequate enforcement, and requiring the recipient to show cause, within a specified period of time,

generally not to exceed 15 days, why appropriate action, described in the notice, to ensure compliance should not be taken. The notice states that the recipient must respond in writing or orally on the record before an official appointed by the Secretary or the proposed action will be taken.

(c) *Decision.* If the Secretary, after reviewing the recipient's oral or written response, determines that such action is necessary, he/she orders that all or any part of the contracting activities of the recipient affected by the recipient's alleged noncompliance be halted until the matter is resolved under §§ 23.81 or 23.83. The Secretary's action under this paragraph may not affect any contract already awarded. When the Secretary makes an order under this paragraph, resolution of the matter shall proceed on an expedited basis.

§ 23.87 Willful provision of incorrect information.

If, at any time, the Department or a recipient has reason to believe that any person or firm has willfully and knowingly provided incorrect information or made false statements, it shall refer the matter to the General Counsel of the Department. He/she may initiate debarment procedures in accordance with 41 CFR 1-1.604 and 12-1.602 and/or refer the matter to the Department of Justice under 18 U.S.C. 1001, as he/she deems appropriate.

Appendix G

POLICY STATEMENT
FULTON COUNTY 1982 MBE PROGRAM

It is the policy of Fulton County to increase minority participation in all public contracts.

In Fulton County, as well as nationwide, minorities have been underrepresented, and in many cases, not represented at all in the public arena in the area of contracts.

Fulton County recognizes its commitment, not only because Federal legislation has been passed, mandating such participation but, because half of its total population (589,904) is non-white or minority (303,509).

In March, 1979 the Fulton County Board of Commissioners adopted a Resolution stating its intention of initiating a program whereby at least twenty percent (20%) of all County contracts be awarded to established minority bidders.

The Fulton County Commission has, as a matter of both principle and law, established an Affirmative Action Program to ensure that no person is discriminated against on the basis of race, color national origin or sex in any program associated with Fulton County. The Commission is further committed to utilize area minority and women owned and controlled banks to the extent possible, and will urge its contractors to follow suit.

This policy will be executed by the formulation of a Minority Business Enterprise Program under the provisions of 49 CFR Part 23 with emphasis of Rules 23.43 and 23.45. All provisions of this regulation will be strictly adhered to

and totally endorsed and practiced by the Fulton County Commission, its agents and employees.

The County's goals for the completion of this project are three-fold; economy of costs; completion by a date certain and the active involvement of minorities.

With respect to the first and second goals, the contract will be awarded to the lowest responsible bidder and prefers the contractor to follow the same policy on subcontracts. Regarding the last goal, the county is interested in, and committed to, participation of minorities in ownership roles; (i.e., subcontracts) as opposed to having the minority participation goal being achieved through a prime contractor's staff, or the hiring of salaried minorities to perform the labor.

The county would prefer that the bidder strive for the largest feasible Minority Business Ownership Participation in all contracts and seek to achieve a goal of not less than twenty percent (20%) overall involvement of such firms.

As a first step in implementing this program, copies of the plan will be made available to all applicable county personnel, and minority organizations. Notice of its availability will be made in the local media, as well as at the local office of the Small Business Administration.

Supreme Court, U.S.
FILED
MAY 8 1991
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No. 90-1562

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

S.J. GROVES & SONS COMPANY AND
JASPER CONSTRUCTION COMPANY,
Petitioners,
v.
FULTON COUNTY, GEORGIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the United States Department of Transportation ("DOT") was authorized to promulgate 49 Code of Federal Regulations, Part 23 (hereinafter "49 C.F.R. Part 23")?[1]

(2) Whether an intermediate level of scrutiny is the appropriate standard to evaluate the validity of DOT regulations authorized by Congress, which require State and local government recipients of federal funds pursuant to federal grant agreements to adopt a Minority Business Enterprise program (hereinafter "MBE" program) utilizing goal percentages?

(3) Whether an intermediate level of scrutiny is the appropriate standard to evaluate the validity of Fulton County's 1982-1987 MBE program adopted and developed solely in compliance with DOT Regulations and pursuant to a federal grant agreement?

---

[1] Respondent Fulton County, Georgia (hereinafter "Fulco") does not agree with Question No. 1 presented by Petitioner to the extent it suggests 49 C.F.R., Part 23 requires state and local governments to establish a quota or set-aside for awarding contracts solely on the basis of race or ethnic origin.

LIST OF INTERESTED PARTIES

The parties to the proceedings below are the following:

Petitioners: S.J. Groves & Sons Company

Jasper Construction Company
(Jasper Construction Company is a wholly owned subsidiary of S.J. Groves & Sons Company)

Respondent: Fulton County, Georgia

The United States Department of Transportation was a party in the District Court and an appellant in the Court of Appeals. On September 28, 1989, the Eleventh Circuit dismissed the United States Department of Transportation pursuant to its motion for voluntary dismissal.

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No. 90-1562

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

S.J. GROVES & SONS COMPANY AND
JASPER CONSTRUCTION COMPANY,
Petitioners,

v.

FULTON COUNTY, GEORGIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 920 F.2d 752 (11th Cir. 1991), and is reproduced in Petitioners' Appendix at App. 1a. The opinion of the United States District Court is reported at 696 F. Supp. 1480 (N.D. Ga. 1987), and is reproduced in Petitioners' Appendix at App. 1b. The District Court's other orders are unpublished, but are reproduced in the Petitioners' Appendix at App. 1d and 1e.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on January 7, 1991. Petitioners purport to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const., Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, limb, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., Amend. XIV, Sec. 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

U.S. Const., Amend. XIV, Sec. 5:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 2000(d) (Title VI):

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 30 of the Airport and Airway Development Act of 1970, as amended by the Airport and Airway Development Act Amendments ("AADA") of 1976, 49 U.S.C. § 1730, and as amended by the Airport and Airway Improvement Act ("AAIA") of 1982, 49 U.S.C. § 2219.

> The Secretary shall take affirmative action to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this chapter. The Secretary shall promulgate such rules as the Secretary deems necessary to carry out the purposes of this section and may enforce this section, and any rules promulgated under this section, through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964. The provisions of this section shall be considered to be in addition to and not in lieu of the provisions of Title VI of the Civil Rights Act of 1964.

49 Code of Federal Regulations, Part 23 (45 F.R. 21172 et seq., March 31, 1980, as amended at 46 F.R. 23457 et seq., April 27, 1981, and as amended at 46 F.R. 60458 et seq., December 10, 1981) entitled "Participation by Minority

Business Enterprises in Department of Transportation Programs".

49 C.F.R. § 23.01-23.55 is reprinted in Petitioners' Appendix at App. 1f.

49 C.F.R. § 21.5(b)(7):

> This part does not prohibit the consideration of race, color, or national origin if the purpose and effect are to remove or overcome the consequences of practices or impediments which have restricted the availability of, or participation in, the program or activity receiving Federal financial assistance, on the grounds of race, color, or national origin. Where prior discriminatory practice or usage tends, on the grounds of race, color, or national origin to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this part applies, the applicant or recipient must take affirmative action to remove or overcome the effects of the prior discriminatory practice or usage. Even in the absence of prior discriminatory practice or usage, a recipient in administering a program or activity to which this part applies, is expected to take affirmative action to assure that no person is excluded from participation in or denied the benefits of the program or activity on the grounds of race, color, or national origin.

O.C.G.A. § 36-10-2.1 (March 26, 1986):

> In any county of this state having a population of 550,000 or more according to the United States decennial census of 1980 or any future such

census, contracts for building or repairing any courthouse or other public building, jail, bridge, causeway, or other public works or public property shall be let to the lowest responsible bidder, but the governing authority of any such county shall have the right to reject any or all bids for any such contract. The governing authority of any such county, in considering whether a bidder is responsible, may consider the bidder's quality of work, general reputation in the community, financial responsibility, previous employment on public works, and compliance with a minority business enterprise participation plan or making a good faith effort to comply with the goals of such a plan.

O.C.G.A. § 36-10-2:

Whenever it becomes necessary to build or repair any courthouse, jail, bridge, causeway, or other public works in any county, the county governing authority shall cause the same to be built or repaired by letting out the contract therefor to the lowest bidder, at public outcry, before the courthouse door, after having advertised the letting of the contracts, as provided in Code Section 36-10-3, provided that such county authorities shall have authority to reject any and all bids at the public letting. If in their discretion, the public interest and economy require it, the county authorities may build or repair other public property in the county by contract or sealed proposals, to be invited under the same provisions as to specifications and like information as are provided in Code Sections 36-10-3 and 36-10-4.

STATEMENT OF THE CASE

This case arises out of a resurfacing project at the Fulton County ("Fulco") Airport. The Fulco Airport is designated as a "reliever airport" by the United States Federal Aviation Administration ("FAA"). The function of a reliever airport is to provide facilities to divert as much general aviation traffic from air carrier airports such as Hartsfield International Airport as is possible in the interest of safety to the traveling public using such fields. Because Fulco's Airport is a designated "reliever airport" it is eligible for federal assistance under the provisions of the Airport and Airway Development Act of 1970, as amended in 1976 (49 U.S.C. § 1701 *et seq.*(1976)) ("AADA"), and as amended in 1982 (Airport and Airway Improvement Act of 1982) ("AAIA") (49 U.S.C. § 2201 *et seq.*).

One of the purposes of the AADA and AAIA was to make funds available for improvements to reliever airports because of the critical purpose they serve in connection with aviation traffic and safety to the travelling public. 1982 U.S. Code Cong. & Ad. News 1156, 1159, 1161, 1163, 1165, 1175; 1976 U.S. Code Cong. & Ad. News 1600, 1602-04, 1608, 1611, 1637-1640, 1644. According to the legislative history of the AADA and AAIA, "reliever airports" serve a vital role *nationwide*, and it is a *federal* policy to maintain the operation of and improve reliever airports. *Id.*

It is with this background that the FAA determined Fulco's instrumented runway was in a *"rapidly"* deteriorating condition, that it "would soon become hazardous and unusable" and that the runway would have to be closed if it was not repaired immediately. The DOT/FAA also determined that the Airport project *"be furnished a high-priority status to federal funds."* Closing

the runway would have resulted immediately in closing the airport. The undisputed evidence establishes that because Fulco did not have sufficient funds *at that time* to repair the runway, Fulco in order to keep the airport in operation had no alternative except to apply for a grant from the United States Department of Transportation ("DOT") pursuant to the AADA.

As an express condition to approval of the Federal Grant Agreement from the FAA and the DOT, Fulco was required to comply with the provisions of the AADA and the regulations promulgated by the DOT, including the provisions of 49 Code of Federal Regulations, Part 23 (45 F.R. 21172 et. seq., March 31, 1980 as amended at 46 F.R. 23457 et seq., April 27, 1981 and as amended at 46 F.R. 60458 et seq., December 10, 1981) (hereinafter "49 C.F.R. Part 23") entitled "Participation by Minority Business Enterprises in Department of Transportation Programs". The DOT Regulations and Federal Grant required Fulco to prepare and submit for approval by the FAA a Minority Business Enterprise ("MBE") program solely for the Airport Project. [See Cross-Petitioner Fulco's Appendix at 1a]. In compliance with the DOT Regulations and Federal Grant, Fulco prepared the MBE program for the Airport Project in 1982.

The MBE percentage goals as required by the DOT Regulations were based upon the availability of qualified MBE's in the area, the type of work involved on a particular project, and past experience with other MBE programs. 49 C.F.R. § 23.45(g). A contractor who was unable to meet those goals, however, could still be awarded the contract if it exercised good faith efforts to meet the goals. 49 C.F.R. 23.45(h). Pursuant to the DOT Regulations, satisfying the MBE goals or making a good faith effort to meet the goals was a condition of Fulco's

receiving the DOT assisted contract. [*Id.*]. *The Fulco MBE Program was developed solely to comply with the DOT Regulations and as an express condition of the Grant Agreement.* Fulco was contractually bound to the commitments made in the MBE program as approved by the DOT.

The Fulco 1982 MBE Program was a five-year program solely for construction at the Fulco Airport. The DOT/FAA reviewed the Fulco Program and determined its compliance with 49 C.F.R. Part 23 (in effect in April 1982), including the minority and female percentage goals. Fulco's MBE Program was approved by the FAA/DOT in April 1982.

In approving the Fulco MBE Program the FAA considered in particular whether the MBE participation percentage goals set by Fulco were reasonable, practical, and complied with 49 C.F.R. Part 23.45. It was determined by the FAA based on this analysis that the Fulco MBE Program complied with 49 C.F.R. § 23.45. The percentage goals for the MBE Program were considered reasonable and attainable and were approved by the FAA. The Fulco 1982 MBE Program complied with the DOT Regulations in every respect and the Program was submitted to and approved by the FAA.

The MBE participation percentage given by Groves with its bid was 4.15%, a number which was not documented as required by the Bid Specifications. The second lowest bid received (approximately $22,000 higher on a $800,000 plus contract) contained the MBE participation level of 10%. The third lowest bid contained the MBE participation level of 22%.

Fulco conditionally awarded the contract to Groves provided that it make a good faith effort to increase its

MBE participation pursuant to the DOT Regulations. Approximately one month later Groves had not increased its 4.15% MBE participation figure. At its next regularly scheduled Board Meeting, Fulco determined that Groves had not used good faith efforts to increase its MBE participation.

Thereafter, Fulco conditionally awarded the contract to the second lowest bidder which had the MBE participation level of 10% in its original bid. The award was conditioned upon that bidder's good faith efforts to increase its MBE participation. Two days following the conditional award of the contract, it increased its MBE participation from 10% to 16%. Fulco determined that a 6% increase in two days constituted a good faith effort on the part of the second lowest bidder, and although it did not achieve the 22% MBE/FBE goal, it awarded the contract to the second lowest bidder with the approval of the FAA.

In its September 30, 1985 Order the District Court, *inter alia*, deferred the cross-motions for summary judgment filed by the parties pending resolution of the validity of the DOT Regulations, and ordered that the DOT be joined as a party defendant. [Petitioners' App. at 1c, 33c]. The District Court concluded that if the DOT Regulations are valid, they would preempt the Georgia low-bid statute, even if Fulco violated that statute. [*Id.*].

Subsequently, the DOT and the Secretary of the DOT were joined to defend the validity of the DOT Regulations. The District Court held the DOT Regulations were invalid. *S.J. Groves & Sons Company and Jasper Construction Company v. Fulton County, Georgia*, 696 F. Supp. 1480 (N.D. Ga. 1987).

The District Court also held that Fulco's 1982 MBE Program for the Airport Project was invalid. The Court stated that reliance on valid DOT Regulations would have provided a defense to Groves' claims against Fulco since it would preempt the Georgia low-bid statute and the State Constitution and would be consistent with Title VI and the Fourteenth Amendment. [Petitioners' App. at 2d]. However, since the Court held the DOT Regulations were invalid, the Court held that reliance on the DOT Regulations by Fulton County did not provide it with a defense. [*Id.*].

The Fulco Program contained an overall 20% MBE and 2% Female Business Enterprise *goal* concerning *all* the projects at the Fulco Airport over a five year period. ***The MBE goal is not a quota or a "set-aside".*** Fulco may award any contract on an individual basis to a contractor who achieved less than 22% participation, and in fact *that is exactly what happened on the Airport Project Groves bid on.* Any Fulco contract for the Airport may contain less than 20% and even 0% MBE participation depending on the availability of qualified MBE's for a particular contract.

Fulco in its application of the Program considers good faith efforts to obtain the goal. If a bidder does not achieve the goal, it still may receive an award of the contract if it exercises good faith efforts to achieve that goal, but is unable to do so. Fulco has an administrative review procedure in its application of the Program and considers each contract on an individual basis.[2]

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[2] The Fulco 1979 Resolution referred to by Groves in Fulco's Policy Statement has nothing to do with the claims Groves has asserted against Fulco relating to the 1982 Fulco MBE Program for projects at the airport adopted in compliance with the DOT Regulations.

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit Correctly Held That Congress Authorized The DOT Regulations, And Therefore, They Have The Force And Effect of Law.

The Eleventh Circuit correctly held that Congress authorized the DOT to promulgate the DOT Regulations. *S.J. Groves*, 920 F.2d at 764. Substantive agency regulations have the "force and effect of law," and therefore preempt state statutes, only when they are "rooted in a grant of [legislative] power by the Congress and subject to limitations which that body imposes." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *S.J. Groves*, 696 F. Supp. 1480, 1483 (N.D. Ga. 1987), *aff'd* 920 F.2d 752, 764 (11th Cir. 1991). "[I]t is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress." *Chrysler Corp.*, 441 U.S. at 304. "What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations." *Id.* at 308; *S.J. Groves*, 920 F.2d at 764; *S.J. Groves*, 696 F. Supp. at 1483.

The DOT identifies eight sources of authority for the DOT Regulations. 49 C.F.R. 23.1(b). The Eleventh Circuit considered only the AADA of 1970 because it concluded Section 30 of the AADA as amended in 1976 (49 U.S.C. § 1730), and as reenacted (changing the number only) in 1982 in the Airport and Airway Improvement Act (49 U.S.C. § 2219), authorizes the DOT to enact its MBE

Contrary to Groves' assertion, that Resolution did not apply to all county contracts regardless of the source of funding, and specifically did not apply to the Airport Project Groves bid on. The only relevance of the 1979 Resolution is that it shows Fulco made findings of past discrimination against MBEs.

regulations. *S.J. Groves*, 920 F.2d at 764. Section 30 provides:

> The Secretary shall take affirmative action to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this chapter. The Secretary shall promulgate such rules as the Secretary deems necessary to carry out the purposes of this section and may enforce this section, and any rules promulgated under this section, through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000 et seq.]. The provisions of this section shall be considered to be in addition to and not in lieu of the provisions of title VI of the Civil Rights Act of 1964.

The Eleventh Circuit found two reasons why Section 30 authorizes the DOT Regulations. First, the actual language of Section 30 indicates a "broad delegation of power to the DOT to create regulations necessary to ensure there is no discrimination by recipients of federal funds under the AADA." *S.J. Groves*, 920 F.2d at 764. Second, Section 30 "endorses rules similar to those established under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and those rules condone, and in some cases require, race-conscious regulations and/or actions. *See* 49 C.F.R. § 21.5(b)(7)." *Id.*[3]

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[3] 49 C.F.R. § 21.5(b)(7) provides:

> This part *does not prohibit the consideration of race*, color, or national origin if the purpose and effect are to remove

The Eleventh Circuit and the District Court correctly concluded that the AADA grants the DOT the authority to effectuate the Act's purposes, and those purposes explicitly condone and in some cases require race-conscious regulations and/or remedies. *S.J. Groves*, 920 F.2d at 764; 696 F. Supp. at 1484. Therefore, the DOT acted within the bounds of properly delegated congressional authority in promulgating the MBE Regulations.

Senator Beall in introducing the floor amendment to add Section 30 to the AADA explained his amendment as follows:

> Mr. President, I consider this to be in the nature of a technical amendment actually but *it will insure minority and female participation in program activities under the Airport Development Act. This amendment will*

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or overcome the consequences of practices or impediments which have restricted the availability of, or participation in, the program or activity receiving Federal financial assistance, on the grounds of race, color, or national origin. *Where prior discriminatory practice or usage tends on the grounds of race, color, or national origin to exclude individuals from participation in,* to deny them the benefits of, or to subject them to discrimination under any program or activity to which this part applies, *the applicant or recipient must take affirmative action to remove or overcome the effects of the prior discriminatory practice or usage.* Even in the absence of prior discriminatory practice or usage, *a recipient in administering a program or activity to which this part applies, is expected to take affirmative action* to assure that no person is excluded from participation in or denied the benefits of the program or activity on the grounds of race, color, or national origin. (emphasis added).

> *require the development of affirmative action plans* that will require that a portion of the money going to construction, concessions, and other projects of the airport development are *earmarked for minority and female business persons.*
>
> Although I am aware that there has been assurance of minority and female participation in these programs by the Department of Transportation in the past I am introducing this amendment so that airport management will be required to adhere to the Department of Transportation's administrative regulations and *will be required to contract with minority and female owned forms* [sic].

122 Cong. Rec. 8200 (Mar. 25, 1976) (emphasis added). [Respondent App. at 1A].

In the House of Representatives, Representative Dellums in offering the same amendment to add Section 30 to the AADA stated:

> Mr. Chairman, this is a technical amendment designed to *assure minority participation in program activities under this act.* The language of the amendment is similar to -- and based upon -- comparable provisions enacted by Congress for other major programs such as the Trans-Alaska Pipeline.
>
> The need for this amendment came to my attention through a series of meetings held within the last 45 days and conducted by my colleague from Maryland (Mr. Mitchell) and myself with representatives of the Federal Aviation Administration, the Office of Minority

> Business Enterprise, the Small Business Administration and minority businessmen. Those meetings centered on existing ADAP regulations, agreements and effectiveness, and it became apparent to me in those discussions that minority entrepreneurs had had little share in projects funded under ADAP. *This amendment stipulates that the Secretary of Transportation develop regulations to provide affirmative action needed to remedy that problem.*

121 Cong. Rec. 41802 (Dec. 19, 1975) (emphasis added). [Respondent App. at 1B].

This Court recognizes that floor remarks of Members of Congress are a valuable source of information regarding Congress' intent in enacting legislation.[4] In fact, former Chief Justice Burger's opinion in *Fullilove v. Klutznick*, 448 U.S. 448 (1980) relied heavily on floor remarks of various Members of Congress. *See Fullilove*, 448 U.S. at 458-463 nn. 14, 20-34, and 39-41 and accompanying text.

Therefore, the DOT's establishment of an affirmative action program was mandated by Congress, just as the Public Works Employment Act MBE set-aside in *Fullilove* was mandated by Congress. The introduction of Section 30 to Congress made it clear that it *"will require the development of affirmative action plans* that will *require that a portion of the money* going to construction

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[4] See *Rice v. Rehner*, 463 U.S. 713, 728, (1983) (sponsor's remarks are *"particularly valuable"* and "an *authoritative guide* to the statute's construction."); *Bowsher v. Merck & Co.*, 460 U.S. 824, 832 (1983); *North Haven Board of Education v. Bell*, 456 U.S. 512, 527 (1982). *See also Lewis v. United States*, 445 U.S. 55, 62-63 (1980). Floor remarks are

. . . of the airport development are earmarked for minority and female business persons." 122 Cong. Rec. 8200 (March 25, 1976) (emphasis added). Moreover, the stated purpose of Section 30 to Congress was "to *assure minority participation* in program activities under this act." 121 Cong. Rec. 41802 (December 19, 1975) (emphasis added).[5]

In an attempt to avoid the Eleventh Circuit's conclusion that the AADA's reference to Title VI rules incorporates Subsection 7 (49 C.F.R. § 21.5(b)(7)), Groves for the first time in this case argues that Congress did not authorize Subsection 7 under the Civil Rights Act of 1964 (Title VI), and therefore the AADA's reference to that rule cannot provide authority for the DOT Regulations. This argument has never been raised in this case, Groves did not raise it below in either the District Court or the Court of Appeals, and there has been no briefing or argument concerning this issue in those Courts. Groves has not preserved for this Court's review this issue it now presents for the first time in its Writ of Certiorari.

It is the general rule of this Court that it does not grant certiorari to consider issues which were not properly argued or preserved below. *See e.g., Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.13 (1976). "We decline to

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even more important where, as here, the provision at issue originated as a floor amendment. *See Bowsher, supra; Bell, supra; Lewis, supra.*

[5] Another source of authority for the DOT's MBE regulation is § 905 of the Railroad Revitalization and Regulatory Reform Act (RRRRA) of 1976, Pub. L. 94-210, 90 Stat. 31 (formerly 45 U.S.C. § 803, now codified at 49 U.S.C. § 306). The Senate Report accompanying the RRRRA, S. Rept. No. 94-499, at pages 44 and 45, reprinted in 1976 USCCAN 58-59, also strongly indicated Congress' intent that an affirmative action program be created.

address this argument because respondent failed to raise it below and because the question it imposes has not been adequately briefed and argued." *Grandfinaciera v. Nordberg*, 492 U.S. ___, 106 L.Ed.2d 26, 38-39 (1989).

Because this argument has not been raised below, this Court lacks guidance from the District Court or the Court of Appeals on this issue. Since in the nine years of proceedings in this case, this argument or issue was never raised by Groves and never addressed by any court below, it is unfair and unnecessary to consider it as a subject of Groves' Petition and without the benefit of the views of the Courts below.

The Secretary of Transportation's determination that it was Congress' intent that an affirmative action program was to be created is entitled to substantial deference. *United States v. Rutherford*, 442 U.S. 544, 553-554 (1979) ("Such deference is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives.") In the instant case, as in *Rutherford*, the DOT's interpretation that Section 30 of the AADA requires an "affirmative action" program "involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives." The DOT's construction of Section 30 therefore "is entitled to substantial deference."

Moreover, in 1982 Congress replaced the 1976 AADA with the AAIA and reenacted in the new AAIA a provision identical to Section 30 of the 1976 AADA. 49 U.S.C. § 2219. It is a well-established principal of law that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without

change." *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66, (1982). The reenactment of Section 30 of the AADA also took place after *M.C. West, Inc. v. Lewis*, 522 F. Supp. 338 (M.D. Tenn. 1981).

II. The Eleventh Circuit Correctly Held That An Intermediate Level Of Scrutiny Is The Appropriate Standard To Determine The Constitutionality Of The DOT Regulations

In *Metro Broadcasting, Inc. v. F.C.C.*, 110 S.Ct. 2997 (1990), this Court utilized an intermediate level of scrutiny in evaluating the validity of federal agency regulations. The Eleventh Circuit correctly held that an analysis of *Fullilove, Croson,* and *Metro Broadcasting* establishes that an intermediate level of scrutiny, not strict scrutiny, is the appropriate standard of review in evaluating the validity of federal regulations like the DOT Regulations.

In *Metro Broadcasting* this Court held "that benign race-conscious measures mandated by Congress – even if those measures are not 'remedial' in the sense of being designed to compensate victims of past government or societal discrimination – are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives." 110 S.Ct. at 3008-09. The majority opinion in *Metro Broadcasting* "made it clear that *Croson* does not prescribe the level of scrutiny to be applied to a benign racial classification employed by Congress." *Id.* at 3009. The opinion of this Court in *Metro Broadcasting* instead relied on *Fullilove*, asserting that a "majority of the Court in *Fullilove* did not apply strict scrutiny to the race-based classification at issue." *Id.* at 3008.

The Eleventh Circuit correctly concluded that a "clear demarcation between affirmative action programs developed by state and local governments and those developed at the direction of Congress was drawn." *S.J. Groves*, 920 F.2d at 767. "Therefore, it seems to us that the Court has created a dual inquiry for evaluating affirmative action programs. First, we must determine whether a state or local government has developed the program, or *whether Congress has authorized the program's creation*. If the former, a Court must strictly scrutinize the program. . . . If the latter, however, then an intermediate level of scrutiny is appropriate." 920 F.2d at 767 (emphasis added). "Intermediate scrutiny means the program must serve an important governmental interest and the means must be substantially related to the achievement of that objective." *Id.*

Because Congress authorized the creation of the MBE program contained in the DOT Regulations, an intermediate level of scrutiny is the appropriate standard in evaluating the regulations. 920 F.2d at 767. The Eleventh Circuit remanded the case for reconsideration in the District Court in light of the intermediate level of scrutiny standard. *Id.*

As shown in Part I, *infra*, the federal statute and regulatory scheme for the AADA, in particular the introduction and passage of Section 30 to the AADA amendments of 1976 and its reenactment in the AAIA of 1982, establishes that its purpose was to insure MBE participation in federal government projects and mandate the development of affirmative action plans.

On March 6, 1978 the DOT issued Order 4000.7A, which reemphasized the enforcement of DOT's MBE Program, and like DOT Circular 1165.1 encouraged all grant recipients to establish percentage goals for MBE

participation. DOT Order 4000.7A provided that the policy of the DOT was to encourage and increase the participation of MBE's in contracts and projects funded by the DOT, and the DOT required its operating elements and all aid recipients and their contractors to make "affirmative action" efforts to meet goals for increasing MBE involvement.

In November 1978 Congress passed the Surface Transportation Assistance Act of 1978 ("STAA"), Pub. L. No. 95-599, 92 Stat. 2689 (1978). In the STAA legislative history, "the House Report of the Committee on Public Works and Transportation acknowledged a departmental initiative on behalf of the . . . (DOT) to encourage the participation of minority business enterprises in the DOT's programs." H.R. Rep. No. 95-1485, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 6575, 6647:

> The Committee is aware that Secretary of Transportation Adams on March 6, 1978, issued a major *Departmental* initiative to encourage participation by minority businesses *in DOT's programs*. Among the mechanisms provided in the new order are requirements that the operating elements *within DOT* establish percentage goals for minority utilization, and that *DOT grantees* prepare written affirmative action plans that include goals, and when allowed by state law, provision under appropriate circumstances for set-asides limited for bidding to minority firms . . . . The Committee supports this strong action by the Secretary and encourages vigorous efforts to carry out the spirit and intent of the new Department Order.

The March 6, 1978 DOT initiative referred to above by the Committee is DOT Order 4000.7A. Congress in the STAA at 49 U.S.C. § 1516(a)(2) specifically delegated to the Secretary of the DOT the responsibility to take affirmative action to insure compliance with Congress' determination that minorities were not fully participating in public contracts at the federal, state and local level. Section 1615(a)(2) of the STAA is virtually identical to Section 30 of the AADA. There is no distinction drawn or limitation applied by Congress with regard different types of federally-funded government contracts in its "finding" that MBE's were not fully participating in public contracts at the federal, state and local level involving the DOT. This is a Congressional finding relating to all federally-funded government contracts involving the DOT, including contracts under the AADA.

In *Fullilove*, Chief Justice Burger stated that in 1977 "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination . . . . [T]here was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well." 448 U.S. at 478; *see Id.* at 461-467. The Court held that although Congress did not, and need not, make the kind of "findings" which would be required of a state or local government, "we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practice, when applied to minority businesses, could perpetuate the effects of prior discrimination." 448 U.S. at 478.

The substantial remedial power of Congress is reaffirmed in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). The Court held that "Congress may identify and redress the effects of society-wide discrimination", and Congress does not have to make findings of discrimination with the specificity as the states or local governments: "the City is not just like the *federal government* with regard to the findings it must make to justify race-conscious remedial action." *Croson*, 488 U.S. at 491 and *quoting Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922, 929 (9th Cir. 1987) (emphasis added). Justice O'Connor, along with Chief Justice Rhenquist and Justice White concurring, *do not make a distinction between the branches of the "federal government"* with regard to the findings in connection with race-conscious remedial action.

Moreover, *Croson* reaffirms that Congress, unlike the States, may "induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions . . . [and] also, where Congress has the authority to declare certain conduct unlawful, *it may . . . authorize and induce state action* to avoid such conduct." *Croson*, 488 U.S. at 488, *quoting Fullilove* 448 U.S. at 483-484 (emphasis added). *Croson* also reaffirms that Congress can empower states to implement remedial programs that the States could not do, constitutionally, on their own account: "Congress may authorize, pursuant to section 5 [of the Fourteenth Amendment], state action that would be foreclosed to the States acting alone." 488 U.S. at 491.

Groves ignores Justice Powell's explicit statement in *University of California Regents v. Bakke*, 438 U.S. 265 (1978), that the *Bakke* decision "does not call into

question *Congressionally authorized administrative actions . . . .*" *Bakke*, 438 U.S. 302, n.41 (emphasis added). Therefore, since the DOT Regulations were "Congressionally authorized administrative actions", *Metro Broadcasting, Bakke, Fullilove* and *Croson* make it clear that federal administrative agency findings enjoy the same deferential treatment as Congress, and that there is no material distinction between the PWEA MBE Program in *Fullilove* and the DOT Regulations promulgated pursuant to Section 30 of the AADA, for purposes of determining the level of scrutiny to apply in evaluating the Regulations.

III. The Eleventh Circuit Correctly Held That Metro Broadcasting Applies In Determining The Constitutionality Of Federal Regulations In Public Contracting

Contrary to the suggestions by Groves, there is no authority for the position that *Metro Broadcasting* does not apply to MBE programs in the public contracting arena or that under *Croson* every MBE program in the public contracting arena should be reviewed under the strict scrutiny standard. Justice Stevens' concurring opinion in *Metro Broadcasting* does not indicate that *Metro Broadcasting* is inapplicable to affirmative action programs in public contracting. Justice Stevens specifically stated as follows: "I join both the opinion and the judgment of the Court". *Metro Broadcasting*, 110 S.Ct. at 3028. It is clear that the opinion and judgment of the Court in *Metro Broadcasting* was to apply an intermediate level of scrutiny in evaluating an affirmative action program promulgated by a federal agency where Congress authorized the program's creation.

Justice Stevens did not indicate any distinction as to the standard of scrutiny applied in *Metro Broadcasting*

from that to be applied in the public contracting arena. Groves is merely speculating in its argument that Justice Stevens' opinions suggest any kind of distinction between the scrutiny that should be applied in evaluating congressionally authorized federal regulations depending upon the subject matter of the regulations.

Moreover, Justice O'Connor in her dissenting opinion in *Metro Broadcasting* indicates that Justice Stevens' opinion in *Fullilove* did not apply strict scrutiny in the public contracting arena. *Metro Broadcasting*, 110 S.Ct. at 3032. This Court should not grant certiorari to limit the ruling of *Metro Broadcasting* to selectively exclude federal agency public contracting programs.

IV. The Eleventh Circuit Correctly Held That The Implementation By Local Governments Of A MBE Program Pursuant To A Federal Grant Agreement Adopted In Compliance With Congressionally Authorized Federal Regulations Should Be Evaluated Under An Intermediate Level Of Scrutiny

The federal statute and regulatory scheme, legislative history, and the historical context in which Section 30 arose establish that there was a clear Congressional mandate for the DOT to promulgate 49 C.F.R. Part 23, Subpart C, and for Fulco to promulgate its 1982 MBE Program. The broad remedial powers of Congress are specifically involved in Section 30 of the AADA, 49 C.F.R. Part 23, and Fulco's implementation of the federal remedial program. Fulco in implementing the MBE provisions of its contract with the United States pursuant to the AADA "was acting pursuant to Congress' compelling interest in eradicating the continuing effects of past discrimination against minorities in the participation of government contracts." *Fullilove*, 448 U.S. 497, (Powell, J. concurring).

The DOT Regulations establish a federal remedial program with which Fulco must comply to receive federal funds. When Fulco implements Congress' plan as developed by the DOT Regulations, it is acting in a quasi-federal capacity, as an agent of the federal government, not as a county. Therefore, Fulco is not in the same position as was the City of Richmond and is not obligated to meet the *Croson* requirements.

The Court in *Fullilove* relied primarily on the Spending Power and Section 5 in upholding the PWEA's MBE set-aside. The Court noted that it "has repeatedly upheld against constitutional challenge the use of [the Spending Power] to induce governments and private parties to cooperate voluntarily with federal policy." 448 U.S. at 474. *See South Dakota v. Dole*, 483 U.S. 203, 206-207 (1987). Because Congress can require local governments and states to comply with race conscious requirements, which *Fullilove* held is within Congress' power, state and local government implementation to fulfill those requirements must be reviewed under the same standard of scrutiny applicable to a congressional statute. This is because in such a case the *state or local legislation is not a state or local program, but rather is the final step in the implementation of a congressionally created federal remedial program.*

Congress can "induce voluntary action to assure compliance with existing Federal statutory or constitutional antidiscrimination provisions . . .", including state or local government actions that would be foreclosed to the local government or states if they were acting alone. *Croson*, 488 U.S. at 488. Fulco acted pursuant to the congressional authority of the AADA/AAIA and the DOT Regulations, when it adopted its Program. Therefore, the *federal nature* of the DOT Regulations and

Fulco's MBE Program establish that the requirements of *Croson* are inapplicable.

In *Fullilove* the PWEA of 1977, which was upheld by the Court, operated and was implemented in a manner virtually identical to the federal program in this case. Congress appropriated money for construction projects which would be distributed to state and local grantees. Those grantees would use the federal funds to award contracts paid for in whole or in part with the federal assistance, and would require of its contractors that a percentage of each grant be provided to MBE's.

In upholding the PWEA "set-aside", the Court in *Fullilove* relied on Congress' authority under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause, the Federal Spending Power, and Congress' determination that there was a problem of *nationwide scope* requiring a *nationwide* remedy: "[T]here was direct evidence before the Congress that this pattern of disadvantage and discrimination existed *with respect to state and local construction contracting* as well. In relation to the MBE provisions, Congress acted within its competence to determine that the problem was *national in scope.*" 448 U.S. at 478 (emphasis added). Once Congress concluded existing public contracting practices would be "perpetuating the prevailing impaired access by minority businesses to public contracting opportunities," the Court found that Congress had the authority to establish a *nationwide remedy. Id.* at 475.

Where, as in this case, a local or state program is enacted to implement federal legislation or regulations imposing requirements on the local or state government, and the legislation or regulations are an integral part of the federal-state-local legislative framework, the local or

state MBE program should be considered a subsidiary element of the federal legislation or regulations.

The Court in *Fullilove* recognized that Congress' decision to require *all* states and localities accepting federal funds to adopt MBE programs did not depend on findings by a particular state or local grantee. *See Milwaukee County Pavers Assn. v. Fiedler*, 710 F. Supp. 1532, 1545-47 (W.D. Wis. 1989), *modified in part*, 731 F. Supp. 1395, 1409-1410, *aff'd* 922 F.2d 419 (7th Cir. 1991) (A local government implementing a federal program need not make independent findings, but rather may rely on Congress' findings).

This Court has rejected the distinction suggested by Groves for local governments, holding that once Congress has exercised its authority to determine that nationwide legislation was necessary, no further findings by any locality are necessary. *E.g., Lau v. Nichols*, 414 U.S. 563, 564-568 (1974), *cited with approval in Fullilove*, 448 U.S. at 479-480; *Oregon v. Mitchell*, 400 U.S. 112, 233, 284 (1970); *Katzenbach v. Morgan*, 384 U.S. 641, 648-649 (1966). In *Oregon v. Mitchell*, the Court refused to require state-by-state findings before a nationwide application would be appropriate. 400 U.S. at 284. In *Lau* there were no findings of discrimination; nevertheless, the Court upheld a federal regulation applicable to public school systems receiving federal funds subject to statutory and administrative conditions. 448 U.S. at 479.

The DOT Regulations and Fulco's 1982 MBE Program contain virtually all the limitations and waiver provisions the Court identified in *Fullilove*. First, Congress found that other alternative remedies had failed, and therefore the use of an MBE program on a nationwide basis was necessary. *Fullilove*, 448 U.S. at 463-68, and 448 U.S. at 511 (Powell, J. concurring). The federal

program in *Fullilove*, the DOT Regulations and the Fulco MBE Program operate prospectively only. 448 U.S. at 481. Both permit a waiver of the percentage goal, if it can be shown that the goals in good faith could not be met. 448 U.S. at 487-89; 448 U.S. at 514 (Powell, J. concurring). The percentage chosen as a goal is not unreasonable. 448 U.S. at 513 (Powell, J. concurring). Both included a complaint/certification procedure to insure that only bona fide minority firms were eligible. 448 U.S. at 482; 49 C.F.R. § 23.45(c),(e) and (f). Both are of limited duration. Fulco's Program expired in 1987.

The good faith provision in the DOT Regulations and Fulco's Program would permit a waiver of the MBE requirement in the event that a MBE was charging an unreasonable price. There is nothing in the record suggesting Groves was rejected as a bidder because Fulco was insisting it accept an MBE who was requesting an unreasonably high price.

Groves attempts to distinguish *Fullilove* from the instant case based upon the fact that under the PWEA Congress expressly set aside 10% of the monies for minority contractors while under the AADA the MBE mechanism was left up to the DOT to put into place. This, however, is a distinction without significance.[6] The PWEA set-aside included a waiver provision which, as Justice Powell noted, was a virtue because it took into account "the availability of qualified minority contractors in a particular geographic area, the size of the locale's minority population, and the efforts made to find minority contractors." 448 U.S. at 514.

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[6] *Fullilove* attached little significance to the difference between the "thou-shalt-not discriminate" regulation in *Lau* and the affirmative action program in *Fullilove*. 448 U.S. at 479.

The net effect of the structure of Section 30 and the MBE regulation is the same as the PWEA MBE set-aside. Rather than Congress setting a rigid quota and directing the Secretary to determine exceptions to it, as under the PWEA, the MBE regulation merely allows the Secretary to approve the percentage *and* the exceptions thereto. 49 C.F.R. Part 23.

In addition to the waiver provisions, the PWEA MBE set-aside and Fulco's MBE Program (in conjunction with the DOT's MBE Regulations) have other similarities: neither overinclusive nor underinclusive, 448 U.S. at 485-486, involvement with only a minimal amount of total construction work (and therefore little burden on nonminorities), *Id.* at 514-515, and periodic review. There is no practical difference between the policy and administrative approach of the Fulco Program and the DOT Regulations, and the policy and administrative approach upheld in *Fullilove*.

V. Supreme Court Review Of This Action Is Premature

This case is not ripe for review. The decree that Groves is seeking to be reviewed by certiorari is not a final one, a fact that alone furnishes sufficient ground for denial of the Petition. *Hamilton Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-258 (1916). "[E]xcept in extraordinary cases, a writ of certiorari does not issue until there is a final decree." *Id.*

The Eleventh Circuit remanded this case to the District Court. 920 F.2d at 767, 769. "[B]ecause the Court of Appeals remanded the case, it is not ripe for review by this Court." *Brotherhood of Locomotive Firemen v. Bangor & Arrostook R.R.*, 389 U.S. 327, 328 (1967).

CONCLUSION

For all the foregoing reasons, Respondent Fulton County, Georgia respectfully requests that this Court deny the Petition for a Writ of Certiorari.

DATED: May 8, 1991
Atlanta, Georgia

Respectfully submitted,
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APPENDIX 4

RESPONDENT IN OPPOSITION

INDEX TO APPENDIX

122 Cong. Rec. 8200 (March 25, 1976) (statement of Sen. Beall) 1A

121 Cong. Rec. 41802 (December 18, 1975) (statement of Rep. Dellums) 1B

. . .

Mr. BEALL. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report the amendment.

The second assistant legislative clerk read as follows:

The Senator from Maryland (Mr. BEALL) proposes an amendment on page 29, after line 21 add the following new section.

Mr. BEALL. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 29, after line 21 add the following new section:

"SEC.--. Civil Rights.

"The Secretary shall take affirmative action to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this title. The Secretary shall promulgate such rules as he deems necessary to carry out the purposes of this section and may enforce this section, and any rules promulgated under this section, through

agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964. The provisions of this section shall be considered to be in addition to and not in lieu of the provisions of title VI of the Civil Rights Act of 1964."

Mr. BEALL. Mr. President, I am introducing an affirmative action amendment to S. 1972, the Airport Development Act of 1970. This amendment would, at page 43, line 17, strike out the final quotation mark and the final period and insert the following new section: Section 31, Civil Rights:

The Secretary shall take affirmative action to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this title. The Secretary shall promulgate such rules as he deems necessary to carry out the purposes of this section and may enforce this section, and any rules promulgated under this section, through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964. The provisions of this section shall be considered to be in addition to and not in lieu of the provisions of title VI of the Civil Rights Act of 1964.

Mr. President, I consider this to be in the nature of a technical amendment actually but it will insure minority and female participation in program activities under the Airport Development Act. This amendment will require the development of affirmative action plans that will require that a portion of the money going to construction,

concessions, and other projects of the airport development are earmarked for minority and female business persons.

Although I am aware that there has been assurance of minority and female participation in these programs by the Department of Transportation in the past I am introducing this amendment so that airport management will be required to adhere to the Department of Transportation administrative regulations and will be required to contract with minority and female owned forms.

Mr. President, I might say that the Secretary of Transportation has given his approval to this amendment and the House has also adopted an amendment of this sort without objection. I hope the managers of the bill see fit to agree to the adoption of the amendment.

The PRESIDING OFFICER (Mr. FORD). The Senator from NEVADA.

Mr. CANNON. Mr. President, if the Senator would agree not to overtry his case, and with no objection, I am inclined to agree with him on it.

Mr. BEALL. With that, I rest my case.

The PRESIDING OFFICER. Is all time yielded back?

All time having been yielded back, the question is on agreeing to the amendment of the Senator from Maryland.

The amendment was agreed to.

Mr. PASTORE. Third reading.

Mr. CANNON. Third reading.

The PRESIDING OFFICER. If there be no further amendment to be proposed, the question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading and was read the third time.

Mr. CANNON. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

. . .

PARLIAMENTARY INQUIRY

Mr. EDGAR. Mr. Chairman, I have a parliamentary inquiry.

The CHAIRMAN. The gentleman will state it.

Mr. EDGAR. Mr. Chairman, if we accept this amendment to delete from the bill the specific language relating to the Oakland International Airport, would a subsequent amendment be in order to delete on page 46, lines 1 through 4, which provide for an authorization of $72 million, which is a duplication of existing law?

The CHAIRMAN. A subsequent amendment to that portion of the bill would still be in order.

The question is on the amendment offered by the gentleman from Ohio (Mr. HARSHA).

The amendment was agreed to.

AMENDMENT OFFERED BY MR. DELLUMS

Mr. DELLUMS. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. DELLUMS: Page 43, line 17, strike out the final quotation mark and the final period.

Page 43, immediately after line 17, insert the following new section:

"SEC. 31. CIVIL RIGHTS.

"The Secretary shall take affirmative action to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this title. The Secretary shall promulgate such rules as he deems necessary to carry out the purposes of this section and may enforce this section, and any rules promulgated under this section, through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964. The provisions of this section shall be considered to be in addition to and not in lieu of the provisions of title VI of the Civil Rights Act of 1964."

Mr. ANDERSON of California (during the reading). Mr. Chairman, I ask unanimous consent that the amendment be considered as read and printed in the RECORD.

The CHAIRMAN. Is there objection to the request of the gentleman from California?

There was no objection.

Mr. DELLUMS. Mr. Chairman, this is a technical amendment designed to assure minority participation in program activities under this act. The language of the amendment is similar to--and based upon--comparable provisions enacted by Congress for other major programs, such as the Trans-Alaska Pipeline.

The need for this amendment came to my attention through a series of meetings held within the last 45 days

and conducted by my colleague from Maryland (Mr. MITCHELL) and myself with representative of the Federal Aviation Administration, the Office of Minority Business Enterprise, the Small Business Administration and minority businessmen. Those meetings centered on existing ADAP regulations, agreements and effectiveness, and it became apparent to me in those discussions that minority entrepreneurs had little share in projects funded under ADAP. This amendment stipulates that the Secretary of Transportation develop regulations to provide the affirmative action needed to remedy that problem.

Mr. SNYDER. Mr. Chairman, will the gentleman yield?

Mr. DELLUMS. I yield to the distinguished ranking minority member.

Mr. SNYDER. I thank the gentleman for yielding.

Mr. Chairman. I have looked over the amendment, and I have no objection to the gentleman's amendment. I think that it is a situation which already exists with the Department of Transportation, but to put it into law would not bother me at all. I am willing to accept it, as are the Members with whom I have discussed it.

Mr. ANDERSON of California. Mr. Chairman, will the gentleman yield?

Mr. DELLUMS. I yield to the gentleman from California.

Mr. ANDERSON of California. I thank the gentleman for yielding.

Mr. Chairman, I accept the gentleman's amendment, and I feel it is a useful addition to the program.

Mr. DELLUMS. I thank the gentleman.

The CHAIRMAN. The question is on the amendment offered by the gentleman from California (Mr. DELLUMS).

The amendment was agreed to.

Supreme Court, U.S.
FILED
MAY 8 1991
OFFICE OF THE CLERK

No. 90-1562

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

S.J. GROVES & SONS COMPANY
and
JASPER CONSTRUCTION COMPANY,
Petitioners,
v.
FULTON COUNTY, GEORGIA,
Respondent.

BRIEF OF *AMICUS CURIAE* ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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May 8, 1991

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INTEREST OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

The Associated General Contractors of America, Inc. is a national trade association of approximately 33,000 firms, including 8,000 general contracting companies throughout the United States. Implementation of race-based contracting preferences and set-aside programs directly affects the members of this organization. The preference that is the subject of the present petition for writ of certiorari is a case in point. Associated General Contractors of America, Inc. has participated as *amicus curiae* in court proceedings challenging preference programs when, as here, they overstep constitutional bounds. All parties have consented to the filing of this brief.

REASONS FOR GRANTING THE WRIT

This case squarely presents the important question whether the Court's decision last term in *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. ____, 110 S. Ct. 2997 (1990), approving "mid-level" review of congressionally mandated race preferences in the award of radio and television licenses, extends to a race preference promulgated by a federal agency, and implemented by state and county recipients of federal funds, in the award of construction contracts. The question merits the Court's attention in light of the approximately 2 billion dollars of federal funding expended each year pursuant to such preferences, and the confusion which the Court's decision in *Metro Broadcasting* has engendered.

Background Statement

In 1982, Fulton County, Georgia, required bidders on an airport runway resurfacing project, ninety per cent financed with a Federal Aviation Administration ("FAA") grant, to exert "best efforts" to allot twenty percent of contract dollars

to minority business enterprises ("MBE").[1] The twenty percent requirement was set by the County in response to federal regulations requiring, as a condition of an FAA grant, that recipients adopt "affirmative action" techniques, including a participation goal set by the recipient, to enhance minority participation in the funded construction. 49 C.F.R. § 23.1 *et seq.* Here the twenty percent goal was carried over by the County from its MBE participation goal applicable to non-federally funded construction programs.[2] The federal regulation also provides that any bidder not meeting the percentage goal must satisfy the recipient that it employed "good faith efforts" to meet the goal. *Id.* § 23.45(h).

Petitioner submitted the lowest dollar bid for the resurfacing project ($818,432.40) with a proposed MBE participation level of 4.5 percent, but Fulton County awarded the contract to the next lowest bidder, which had proposed sixteen percent MBE participation, on the ground that petitioner, unlike the bidder chosen, did not utilize best efforts to maximize MBE participation.[3] Petitioner challenged the denial on various grounds, including that the MBE program violated Georgia's low-bid statute and the Equal Protection clause of the Fourteenth Amendment. The district court held

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[1] "Minority" is defined to include Black, Hispanic, Portuguese, Asian American, American Indian and Alaskan Native citizens or lawful permanent residents of the United States, as well as members of other groups found to be economically and socially disadvantaged by the Small Business Administration under section 8(a) of the Small Business Act, as amended, 15 U.S.C. § 637(a). 49 C.F.R. § 23.5 (1990).

[2] The District Court found that the numbers selected by the County "were based upon the availability of MBEs in the area, taking into account prior successes with MBE programs, including those of the city of Atlanta, and the Metropolitan Atlanta Rapid Transit Authority. . . . " App. 3c.

[3] Petitioner's defense was that it should have been exempt from the subcontracting requirement since it did not need to hire subcontractors because it owned its own asphalt plant and trucks, the heart of the paving contract. App. 4c. It also claimed it had used its best efforts to include MBE's. *Id.*

that Georgia's low-bid statute did not authorize the MBE program, and that the state statute was not preempted by federal law because the federal MBE regulations violated the Constitution. *S.J. Groves & Sons Co. v. Fulton County*, 696 F. Supp. 1480, 1495 (N.D. Ga. 1987) (App. 1b).

The Eleventh Circuit reversed. *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 767 (11th Cir. 1991) (App. 1a). Agreeing with the district court that the 1982 MBE program violated Georgia's low-bid statute (*id.* at 761-763), the Court observed that the County's preemption defense would stand only if the MBE program passed constitutional muster. *Id.* at 763. This question involved three separate inquiries. First, citing *Fullilove v. Klutznick*, 448 U.S. 448, 473 (1980), the Court determined that Congress was authorized to enact the program embodied in the Department of Transportation ("DOT") regulations. *Id.* at 764. Second, the Court decided that the DOT was authorized by Section 30 of the Airport and Airway Development Act of 1970 ("AADA"), 49 U.S.C. App. § 2219, to create the program.[4] *Id.* Finally, the Court addressed the appropriate standard by which to evaluate the constitutional validity of the DOT regulations. Acknowledging that the issue "is hardly free of doubt" (*id.*, 920 F.2d at 766), the court decided that this Court's decision last term in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. ____, 110 S.Ct. 2997, *reh'g denied*, ____ U.S. ____, 111 S.Ct. 15 (1990) required that "intermediate" rather than "strict" scrutiny of

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[4] The section reads:

> The Secretary shall take affirmative action to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this chapter. The Secretary shall promulgate such rules as the Secretary deems necessary to carry out the purposes of this section and may enforce this section, and any rules promulgated under this section, through agency and department provisions and rules which shall be similar to those established and in effect under Title VI of the Civil Rights Act of 1964.

the MBE program be applied on the ground that Congress "authorized the program's creation."[5]

Discussion

A. The Court's *Metro Broadcasting* Decision Does Not Authorize "Mid-level" Scrutiny Of The Transportation Department's MBE Program

The Eleventh Circuit erred in holding that *Metro Broadcasting* requires "mid-level" scrutiny here of the constitutional validity of DOT's regulatory MBE program. The Court in *Metro Broadcasting* applied a "mid-level" constitutional review standard to determine the validity of the Federal Communications Commission's ("FCC") minority preference programs, but only because *Congress itself*, after specific consideration of the racial preference at issue, *mandated* the programs. Justice Brennan, writing for the majority, emphasized that "[i]t is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved — indeed, mandated — by Congress." *Id.* at 3008.

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[5] The Court said:

> [I]t seems to us that the Court has created a dual inquiry for evaluating affirmative action programs. First, we must determine whether a state or local government has developed the program, or whether Congress has authorized the program's creation. If the former, a court must strictly scrutinize the program. That is, the means chosen must be narrowly tailored to achieve a compelling governmental interest. If the latter, however, then an intermediate level of scrutiny is appropriate. The program must serve an important governmental interest and the means must be substantially related to the achievement of that objective. Because Congress authorized the creation of the MBE program contained in the DOT regulations, the district court should have applied an intermediate level of scrutiny in evaluating the regulations.

920 F.2d at 767.

By contrast, it cannot be said in this case that Congress considered, "mandated," or "specifically approved" DOT's regulatory requirement of minority participation goals. Nor did Congress devise, influence, or otherwise play a role in the County's separate choice of a twenty percent minority participation goal. Accordingly, *Metro Broadcasting* provides no authority for the Eleventh Circuit's holding that the instant MBE program should be subject to an intermediate level of scrutiny.

In *Metro Broadcasting*, the majority cited several considerations supporting its approval of "close [judicial] examination" but "appropriate deference" to Congress, "when a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress. . . . " 109 S.Ct. at 3008. It pointed, for example, to the fact that Congress is charged by the Constitution with the power to provide for the general welfare and to enforce, by appropriate legislation, the equal protection clause of the Fourteenth Amendment. *Id.*; *Fullilove, supra*, 448 U.S. at 472. Its legislative decisions are therefore accorded "great weight" by the judiciary. *Fullilove, supra*, 448 U.S. at 472. Indeed, it has been said that passing on the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called on to perform." *Fullilove, supra*, 448 U.S. at 472, *quoting Blodgett v. Holden*, 275 U.S. 142, 148 (1927). The majority further noted that Congress is "a national legislature that stands above factional politics . . . ", *Metro Broadcasting, supra*, 110 S.Ct. at 3009, unlike a state or local body which is subject to greater potential for racial politics. *City of Richmond v. Croson*, 488 U.S. 469, 491 (1989); *Associated General Contractors of California v. City & County of San Francisco*, 813 F.2d 922, 929 (9th Cir. 1987) ("the narrower a government's domain, the greater the likelihood of oppression.").

It was from this perspective that the majority in *Metro Broadcasting* concluded that "race-conscious classifications

adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments." 110 S.Ct. at 3009. Citing *Fullilove* as support, the majority observed that there the Court did not employ "strict scrutiny" in approving a minority set-aside program which was "*congressionally* mandated." *Id.*, n.13 (emphasis in original).

These principles have no play in this case, however, since the Eleventh Circuit never found — nor could it have — that *Congress* adopted or mandated the minority-participation preference subject to review. At most, according to the court below, Congress "authorized the [MBE] program's creation" (920 F.2d at 767) in section 30 of the Airport and Airway Development Act of 1970, 49 U.S.C. App. § 2219.[6] While we agree with petitioner that even the Eleventh Circuit's "authorizing" finding assigns too much to the federal statute,[7] accepting that proposition for the moment means simply that Congress empowered the DOT to determine in what circumstances, if any, race-conscious remedial action might be necessary to "remove or overcome the effect of" prior discrimination that had operated to

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[6] The Court interpreted that section as:

> a broad [congressional] delegation of power to the DOT to create regulations necessary to ensure there is no discrimination by recipients of federal funds under the AADA. Second, the statute endorses rules similar to those established under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and those rules condone, and in some cases require, race-conscious regulations and/or action. *See* 49 C.F.R. § 21.5(b)(7).

920 F.2d at 764.

[7] The statute is most fairly read as prohibiting race-conscious preferences. *See* note 4, *supra*. Therefore, as petitioner argues (Pet. at 10-16), it does not authorize DOT's minority participation goal requirement. Rather, it authorizes only non-exclusionary "affirmative action" measures that prefer "no person" on account of "race, creed, color, national origin, or sex . . . " 49 U.S.C. App. § 2219.

exclude individuals on grounds of race, color, or national origin from participation in any DOT program or activity. 49 C.F.R. § 21.5(b)(7).[8] Nowhere does Congress direct the agency to fashion a racial response; nor does the federal legislation contemplate congressional approval of the regulatory scheme adopted. Rather, Congress left such matters as the nature and dimension of whatever affirmative action measures are to be developed wholly to the DOT's discretion — authorizing it to act, we would presume, within constitutional limits.

Both *Metro Broadcasting* and *Fullilove* are in these circumstances of no precedential value here. In *Metro Broadcasting*, the administrative scheme promulgated by the FCC was accorded a measure of deference under the Court's mid-level review standard precisely because, as found by the majority, it was considered, approved — indeed mandated — by Congress. 110 S.Ct. at 3008-3009. Likewise, in *Fullilove*, a plurality of the Court used an intermediate level of review to scrutinize, and by a splintered vote uphold

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[8] Subsection 7 provides:

> (7) This part does not prohibit the consideration of race, color, or national origin if the purpose and effect are to remove or overcome the consequences of practices or impediments which have restricted the availability of, or participation in, the program or activity receiving Federal financial assistance, on the grounds of race, color, or national origin. Where prior discriminatory practice or usage tends, on the grounds of race, color, or national origin to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this part applies, the applicant or recipient must take affirmative action to remove or overcome the effects of the prior discriminatory practice or usage. Even in the absence of prior discriminatory practice or usage, a recipient in administering a program or activity to which this part applies, is expected to take affirmative action to assure that no person is excluded from participation in or denied the benefits of the program or activity on the grounds of race, color, or national origin.

against a facial constitutional attack, a minority set-aside program the "critical determinations" of which were made by Congress after due consideration of the merits of the proposed action.[9] 448 U.S. at 468.

Without anywhere near the same degree of congressional focus and direction here, DOT's racial preference program — even assuming authorization from Congress to fashion affirmative action measures, if needed, to remedy prior exclusionary practices — must, by contrast, face the most exacting scrutiny to insure constitutional compliance. Nothing in *Metro Broadcasting*, *Fullilove*, or to our knowledge any other decision of this Court, suggests any lesser judicial vigilance with respect to racial classifications fashioned solely by an administrative agency.[10]

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[9] These "critical determinations" included:

> the decision to initiate a limited racial and ethnic preference; the specification of a minimum level for minority business participation; the identification of the minority groups that are to be encompassed by the program; and the provision for an administrative waiver where application of the program is not feasible. Congress relied on the administrative agency to flesh out this skeleton, pursuant to delegated rulemaking authority, and to develop an administrative operation consistent with legislative intentions and objectives.

Fullilove, *supra*, 448 U.S. at 468.

[10] Petitioner makes the point (Pet. at 21-23), which we endorse for the reasons stated, that *Metro Broadcasting* may well have little relevance in the public contracting area even on its own terms, since Justice Stevens has elsewhere expressed reservations that raise doubts about the decision's applicability in this quite different context. *See Croson*, *supra*, 488 U.S. at 512-13 (Stevens, J., concurring). It is, in any event, certainly the case that *Metro Broadcasting* does not relieve Congress or federal agencies of the obligation to ground such programs on specific findings that identify the purpose for classifying by race. Nor does *Metro Broadcasting* suggest any disagreement with *Fullilove*'s general conclusion that in the area of public contracting that purpose must be remedial, aimed at redressing unlawful discrimination. No such findings were ever made by Congress, the DOT or the County here.

B. Strict Scrutiny Is The Appropriate Standard To Review The Constitutionality Of The Transportation Department's MBE Regulations And State Or Local Actions Taken Pursuant Thereto

The instant MBE preference goals allocate a valuable government advantage on the basis of race, color or national origin, to bidders for construction contracts funded with state and federal funds. The preference classifies by race and is therefore presumptively at odds with the guarantee of the Equal Protection Clause of the Fourteenth Amendment.

Croson teaches that a state or local governmental body cannot on its own engage in such race-based classifications, even as "affirmative action," unless it shows a *compelling* need to do so in order to remedy prior identified discrimination that persists despite the use of non-racial corrective measures. *City of Richmond v. Croson, supra*, 488 U.S. at 493. Even then, use of race must be "narrowly tailored" to redress the identified discrimination in a manner that is least intrusive of the rights of innocent third parties. *Id.* at 507-508; *see also Wygant v. Jackson Board of Education*, 476 U.S. 267, 282-84, *reh'g denied*, 478 U.S. 1014 (1986); *Local 28 Sheet Metal Workers International Association v. EEOC*, 478 U.S. 421, 476 (1986); *United States v. Paradise*, 480 U.S. 149, 183-86 (1987). This Court's insistence on "strict scrutiny" of such arrangements to ensure compliance with these requirements is in recognition that a "lower standard signals that the Government may resort to racial distinctions more readily" (*Metro Broadcasting*, 110 S.Ct. at 3033 (O'Connor, J. dissenting)) — a result not to be countenanced.

Indeed, whatever modest running-room might be available to Congress in limited circumstances,[11] the Fourteenth Amendment offers no apparent justification for relaxing the equal protection guarantee otherwise. Certainly, administrative agencies can claim no particular entitlement to constitutional deference. *See* Petition at 20. They do not as a general matter engage in the public debate or act in a representative capacity. Their expertise, such as it is, lies largely within the area of their assigned legislative responsibility, not beyond. And, their geographic frame of reference rarely takes into account the realities of life outside the Nation's Capitol. It is precisely because administrative rulemaking occurs within a sheltered environment, relatively speaking — largely unaccountable to the public for decisions made and undaunted by traditional checks and balances from outside forces — that an

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[11] Section 5 of the Fourteenth Amendment — which grants to Congress alone the enforcement authority of the Amendment's Section 1 (U.S. Const., Amend. XIV) — has been referenced as the basis for permitting greater deference to congressional action that mandates classifications by race. *See Metro Broadcasting, supra,* 110 U.S. at 3008 (Brennan, J.). One can legitimately question how a constitutional authorization to Congress to take whatever action necessary *to enforce* the equal protection guarantee can be read as expanding the Constitution's tolerance for congressional "affirmative action" (in the form of a racial preference) that flies in the face of equal protection. *Id.* at 3045 (Kennedy, J., dissenting).

To date, *Metro Broadcasting* stands alone as support for that seemingly anomalous legal proposition, and, as indicated in note 10, *supra,* it appears to have exceedingly limited application. Since *Fullilove* was a divided opinion, with no justice able to command a majority, its precedential value is negligible. Moreover, the federal statute that survived a facial constitutional challenge in *Fullilove* was saved because its set-aside program was to be applied so as to benefit those minority contractors able to show injury from prior industry discrimination. *See* 448 U.S. at 487-88; *Croson, supra,* 488 U.S. at 489. Thus, the racial preference was tied by Congress to those actually able to demonstrate in an administrative proceeding that they were victimized because of the discrimination — and, thus, if honestly applied, it was in fact no preference at all. *See, e.g., Croson,* 488 U.S. at 526 (Scalia, J., concurring).

emerging racial classification demands the most exacting judicial scrutiny.

Perhaps where Congress mandates a federal agency to allocate resources by race, it is enough to show that the congressional judgment, as administratively implemented, is grounded on a mid-level "substantial government interest." *See Metro Broadcasting, supra*, 110 S.Ct. at 3008-09; *but see* note 10, *supra*. Without the federal legislative mandate, however, the Fourteenth Amendment imposes on all such government action a heightened, "compelling interest" justification, tested under the most intense judicial scrutiny. The Eleventh Circuit erred in holding otherwise.

Indeed, the error here is particularly egregious because Congress left entirely to DOT whether and in what circumstances "affirmative action" measures should be addressed in rulemaking, insisting only on *non*-discrimination. *See* note 7, *supra*. DOT, then, on its own adopted an impermissible racial preference program and insisted as a price of participation in government construction activities that county recipients do likewise. Most assuredly, the county's second-tier racial classification demands *Croson* scrutiny. *Croson, supra*, 488 U.S. at 493-96. Nor has any good reason been offered for being constitutionally less vigilant of the federal administrative program. *Compare Croson*, 488 U.S. at 491, with *Associated General Contractors of California, supra*, 813 F.2d at 929.

CONCLUSION

Accordingly, for the reasons stated, as well as the arguments set forth in the petition, the writ of certiorari should be granted to permit plenary review by this Court of the Eleventh Circuit's erroneous ruling.

Respectfully submitted,

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